SUPREME COURT OF THE UNITED STATES.

No. 278.

HARRISON THOMSON, APPELLANT,

vs.

THE CENTRAL OHIO RAILROAD COMPANY AND THE STEUBENVILLE AND INDIANA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a circuit court of the United States, within and for the seventh judicial circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati on the first Tuesday, being the fourth day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States of America the eighty-ninth—present, the honorable Noah H. Swayne and the honorable H. H. Leavitt, judges of said court—among the proceedings had were the following, to wit:

THE CENTRAL OHIO RAILROAD COMPANY and the Steubenville and Indiana R. Road Company
vs.
HARRISON THOMPSON.

Be it remembered that heretofore, to wit, on the twenty-fifth day of November, being at the October term of said court, in the year of our Lord one thousand eight hundred and sixty-two, came the plaintiff, by Messrs. Hunter and Goddard, their att'ys, and filed in the clerk's office of said court a certain transcript from the court of common pleas of Muskingham county, State of Ohio, which is in the words and figures following, to wit:

Transcript.

Pleas before the court of common pleas within and for the county of Muskingham, in the State of Ohio, begun and held at the court-house in the city of Zanesville, in said county, on Monday, the third day of November, in the year of our Lord one thousand eight hundred and sixty-two, it being the November term, A. D. 1862, of our said court of common pleas within and for said county.

2 Present: Honorable Ezra E. Evans, judge.

THE CENTRAL OHIO RAILROAD and the STUBENSville and Indiana Railroad Company
versus
HARRISON THOMPSON.
} Civil action.

Court of common pleas.

THE STATE OF OHIO, *Muskingham county, ss:*

Be it remembered that heretofore, to wit, on the 20th day of April, in the year of our Lord one thousand eight hundred and sixty-two, came the said plainants, by Goddard and Bunker, esquires, their attorneys, and filed in our said court here their certain petition, affidavit thereto, and præcipe for summons, all of which read in the words and figures following, that is to say:

Petition.

Muskingham county court of common pleas.

THE CENTRAL OHIO RAILROAD COMPANY and the Steubensville and Indiana Railroad Company
versus
HARRISON THOMPSON.

The plaintiffs say that the defendant, being indebted to them for freight in the sum of $2,953 60 on the first day of October, 1861, the plaintiffs drew their draft in favor of D. Robinson, cashier of the Commercial Bank of Pittsburgh, upon the defendant, payable at the Bank of the Metropolis, Washington, at one day after sight, for the said sum of $2,953 60, which draft was accepted by the defendant, and was not paid at its maturity, and said draft was after taken up by the plaintiffs; that there is now due the plaintiffs thereon the said sum of $2,953 60, and the interest on the same from October 21st day of *October*, 1866.

Second. The plaintiffs say that the defendant, being indebted to them for freight upon mules transported from Cincinnati, Ohio, to Harrisburgh, Pa., by the plaintiffs for defendant in Octo-
3 ber, 1861, the plaintiffs, on the 4th day of October, 1861, drew a draft on the defendant, in favor of D. Robinson, cashier of the Commercial Bank of Pittsburgh, Pa., at one day after sight, for the sum of $2,158 40, payable at the Bank of the Metropolis, Washington city, D. C., which draft the defendant accepted, and afterwards the said draft was protested for non-payment, and the plaintiffs were compelled to take up the same. Plaintiffs say that the defendant is now indebted to them on said draft in the sum of $2,158 40, and the interest thereon from said 4th day of October, 1861.

Third. The plaintiffs say that on the 8th day of October, 1861, the defendant was indebted to them for transportation of mules from Cincinnati to Harrisburgh, Pa., in the sum of $1,669 20, which was to be paid by the defendant upon the draft of the plaintiffs in favor of D. Robinson, cashier of the Commercial Bank of Pittsburgh, Pa., payable at the Bank of the Metropolis, Washington city, D. C., at one day after sight; that plaintiffs, on said 8th day of Oct., 1861, drew upon the defendant in favor of said cashier, payable as aforesaid, which dratt the defendant upon presentation refused to accept, which last named draft was protested for non-acceptance and non-payment; that there is now due the plaintiffs, on said cause of action, the said sum of $1,669 20, with interest thereon from October 8th, 1861.

Fourth. The plaintiffs say that, at the request of the defendant, about the 8th day of October, 1861, they paid charges upon a lot of mules of the defendant, which were shipped from Cincinnati to Harrisburgh, Pa., to the amount of $432, which sum is now due the plaintiffs from the defendant, with the interest thereon from
4 the 8th day of October, 1861. The plaintiffs, therefore, pray

judgment against the defendant for the said several sums of money, in the aggregate $7,213 20, and the interest as above stated.

By GODDARD & BUNKER,
their Attorneys.

THE STATE OF OHIO, *Muskingham county, ss:*

D. H. Caldwell, of lawful age, being duly sworn, says that he is assistant superintendent of the Central Ohio Railroad Company; that the same is a corporation, and that the matters set forth in the foregoing petition he believes to be true.

D. W. CALDWELL.

Sworn to by D. W. Caldwell before me, and by him subscribed in my presence, this 28th day of April, A. D. 1862.

JOHN HOOPER, *Deputy Clerk of said Court.*

THE CENTRAL OHIO RAILROAD COMPANY and the Steubensville and Indiana Railroad Company
versus
HARRISON THOMPSON.

The clerk will issue a summons to sheriff of Muskingham county, returnable according to law. Amount claimed $7,213 20, with interest on $2,953 60 thereof from October 1st, 1860, and on $2,158 40 thereof from October 4th, 1861, and on $1,669 20 thereof from October 8th, 1861, and on $432 thereof from October 8th, 1861.

GODDARD & BUNKER,
Attorneys for Plaintiffs.

And thereupon, on the said 28th day of April, A. D. 1862, there was forthwith duly issued herein a writ of summons, reading with its indorsements in the words and figures following, to wit, that is to say:

THE STATE OF OHIO, *Muskingham county:*

To the sheriff of the county of Muskingham aforesaid:

You are hereby commanded to notify Harrison Thomson that he has been sued by the Central Ohio Railroad Company and the Steubensville and Indiana Railroad Company in the court of common pleas of said Muskingham county, and that unless he answer by the 31st
5 day of May, A. D. 1862, the petition of said the Central Railroad Comp'y and the Steubensville and Indiana Railroad Company against him, filed in the clerk's office of said court, the said petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 12th day of May, 1862.

Witness my hand and the seal of said court at Zanesville, in said Muskingham county, this 28th day of April, A. D. 1862.

CHARLES C. RUSSELL, *Clerk of said Court,*
By JOHN HOOPER, *Deputy.*

Am't claimed $7,213 20, with interest on $2,953 60 thereof from October 1st, 1861, and on $2,158 40 thereof from October 1st, 1861, and on $1,669 20 thereof from October 8th, 1861, and on $432 thereof from October 8th, 1861.

GODDARD & BUNKER.
Attorneys for Plaintiffs.

And the summons was afterwards, to wit, on the 1st day of May, A. D. 1862, duly returned by the said sheriff, endorsed: "Received this writ April 28th, A. D. 1862, at 9 o'clock p. m., and on the same day personally served by delivering Harrison Thomson a certified copy of this writ.

J. C. WOLF, *Sheriff.*

Defendant ruled to answer by 31st day of May, 1862.

And at the May term, A. D. 1862, of our said court, this cause was continued. And afterwards, to wit, on the 7th day of November 1862, came the said defendant, by C. N. Olds and S. J. Critchfield esquires, his attorneys, and filed herein his certain petition, and affidavit thereto, which read in the words and figures following, to wit:

To the hon. the judge of the court of common pleas of Muskingham county, in the State of Ohio:

The petition of Harrison Thomson, of the county of Clark, in the State of Kentucky, respectfully represents that on the 28th day
6 of April, A. D. 1862, at the said county of Muskingham, in said State of Ohio, the sheriff of said county served upon your petitioner a certain writ of summons issued by the clerk of said court of common pleas in a certain civil action in said court, wherein the Centrail Ohio Railroad Company and the Steubensville and Indiana Railroad Company are plaintiffs, and your petitioner the sole defendant, in which said action the said plaintiffs claim to recover from your petitioner the sum of $7,213 20 and interest thereon, and which said writ of summons bears date the 28th day of April, A. D. 1862.

And your petitioner further represents that, at the time of the issuing and service of said writ of summons, your petitioner was and still is a citizen of the said State of Kentucky, and the said plaintiffs, the Central Ohio Railroad Company and the Steubensville and Indiana Railroad Company, a corporation created by and under the laws of the said State of Ohio, and were such corporations at the date and service of said writ of summons as aforesaid, and still continue to be, and were at said times, and still continue to be, engaged in the transaction of business in said State of Ohio, and were at said times, and continue to be, capable of being treated as citizens of said State of Ohio for all the purposes of suing and being sued.

Your petitioner further represents that the matter in dispute in said suit between your petitioner and the said Central Ohio Railroad Company and the Steubensville and Indiana Railroad Company exceeds in value the sum of five hundred (500) dollars, exclusive of costs.

Your petitioner, therefore, prays that said suit may be removed for trial into the next circuit court of the United States within and for
7 the southern district of Ohio, according to the act of Congress in such case made and provided; and your petitioner now offers Robert Neil, of Columbus, Ohio, as his surety, for entering in said circuit court on the first day of its next session, copies of the pleadings and process against him in said suit, and also for his there appearing, according to law.

By C. N. OLDS and L. J. CRITCHFIELD,
Attorneys for said Petitioner.

THE STATE OF OHIO, *Muskingham, ss:*

Harrison Thomson, the petitioner in the foregoing petition, on his oath states, that he is now, and was on the 28th day of April, A. D. 1862, and at all other times since he was born, a citizen of the State of Kentucky, and that all the statements in said petition are true, as he verily believes.

HARRISON THOMSON.

Subscribed in my presence and sworn to before me, the 7th day of November, 1862.

JOHN HOOPER,
Deputy Clerk of said Court.

And at the said November term, A. D. 1862, of our said court, to wit, on the 10th day of November, A. D. 1862, the said def't Harrison Thomson having filed herein his petition for the removal of this cause to the next circuit court of the United States for the southern district of Ohio, and the said petition having been heard and considered, and the court being satisfied of the truth of the facts therein stated, and the said def't Harrison Thomson offering Robert Neil, of Columbus, Ohio, his surety for entering into said circuit court on the first day of its next session, copies of the process and pleadings against him, in said suit, and also for his there appearing, according to law, which surety is accepted by the court, and the court fixes the amount of the bond at ten thousand dollars, and the
8 said bond is executed by the said Thomson and Neil, accordingly, to the acceptance of the court: It is therefore ordered that the said Central Ohio Railroad Company and the Steubensville and Indiana Railroad Company do no further prosecute their said suit in this court, and that the same may be removed into the said circuit court, according to the act of Congress in such case made and provided.

The plaintiffs except to the opinion of the court.

The said bond reads in the words and figures following, to wit:

Know all men by these presents that we, Harrison Thomson, of Kentucky, and Robert Neil, of Columbus, Ohio, are held and firmly bound unto the Central Ohio Railroad Company and the Steubensville and Indiana Railroad Company in the penal sum of ten thousand dollars, to the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors

and administrators. Sealed with our seals, and dated this 8th day of November, A. D. 1862.

The condition of the above obligation is such, that whereas the said Harrison Thomson hath applied to the court of common pleas, within and for the county of Muskingham, in the State of Ohio, to remove into the circuit court of the United States for the southern district of Ohio a certain suit now pending in said court of common pleas, wherein the said Central Ohio Railroad and the Steubensville and Indiana Railroad Company are plaintiffs, and Harrison Thomson is defendant: Now, if the said Harrison Thomson shall enter into said circuit court, on the first day of its next session, copies of the pleadings and process in said suit against him, so pending as aforesaid in said court of common pleas, and shall also in said circuit court appear, according to the act of Congress in such case made and provided, then this obligation shall be void; otherwise, in full force and virtue in law.

HARRISON THOMSON. [SEAL.]
ROBERT NEIL. [SEAL.]

THE STATE OF OHIO, *Muskingham Mo., ss:*

I, Charles C. Russell, clerk of the court of common pleas within and for said county of Muskingham, do hereby certify that the foregoing is a true copy of the process and proceedings in the above case, as the same remain of record in my office. In testimony whereof, I do hereto set my hand and official seal this 18th day of November, A. D. 1862.

[SEAL.] CHARLES C. RUSSELL, *Clerk.*

Motion.

And afterwards, to wit, on the 20th day of January, in the year of our Lord one thousand eight hundred and sixty-three, being at the January term of said court, on motion of the plaintiffs, the court directs the clerk to correct the entry of this case on the appearance docket, so that it be entered as a cause in chancery. Also leave is given to the plaintiffs to file in said suit their bill of complaint in chancery, in substitution of their petition, originally filed in the State court, alleging the same causes of complaint. And the defendant is ruled to answer said bill by the same rule day that he would be required to answer the same if said bill of complaint had been filed as an original suit in this court. Whereupon, in pursuance of the leave granted in the foregoing entry, came the complainants by their att'ys on the twentieth day of January, in the year of our Lord one thousand eight hundred and sixty-three, and filed their bill of complaint herein, which is in the words and figures following, to wit:

Bill.

To the honorable the circuit court of the United States for the southern district of Ohio, in chancery sitting:

The Central Ohio Railroad Company, a body corporate,
10 created and duly organized, under and by authority of the acts

of the general assembly of the State of Ohio, having its office and principal place of business at Zanesville, in said State, and the Steubenville and Indiana Railroad Company, a body corporate, created and duly organized, under and by authority of the general assembly of the State of Ohio, having its office and principal place of business at Steubenville, in said State, bring this their bill of complaint against Harrison Thomson, a citizen and resident of the State of Kentucky.

And thereupon your orators, complaining, say, that they commenced a civil action in the court of common pleas of Muskingham county, in the State of Ohio, within the district aforesaid, against the said defendant Harrison Thomson, for the same causes of complaint in this bill of complaint set forth, and that the said defendant, at the time of entering his appearance to said action in said court of common pleas, filed his petition in said court for the removal of the cause for trial to this court, according to the statute in such case made and provided, and the same was removed accordingly. And they aver and charge that the causes of action in this behalf against said defendant, for which they commenced their said action against him, were and are as follows, to wit: that on the thirtieth day of August, A. D. 1861, and before and after date, and prior to the commencement of said civil action, your orators each owned and carried on a railroad, each constituting a part of a through line, upon and by means of which live stock and other commodities, in the usual course
11 of such business, were carried and transported from Cincinnati, in the State of Ohio, to Pittsburgh and Harrisburgh, in the State of Pennsylvania, Baltimore, Maryland, and other points east and west of your orators' said roads, and along and upon the lines thereof; that to facilitate their business on their said road, your orators severally employed an agent in Cincinnati, with power to contract in their behalf for the transportation of live stock, and other commodities, from Cincinnati eastwardly to Pittsburgh and other points over the roads of your orators, or either of them, so constituting parts of the through line aforesaid, the proceeds of said business, as between your orators, to be divided and their advancements to connecting roads on said through line, for transportation over their roads, to be made and settled for between your orators according to certain terms of arrangement, which your orators are advised are not material to be herein set forth, for any of the purposes of this case; that your orators severally employed the same person, namely, one L. Devinney, to be their agent at Cincinnati, for the purposes aforesaid; that in many business transactions and otherwise, your said orators, the Steubenville and Indiana Railroad Company, was, and is, known by the name of Pittsburgh, Columbus and Cincinnati railroad line, and was and is designated by that name in the transactions with the def't in question in this case; that your orators' said agent at Cincinnati, being informed by the def't that he and others were desirous to transport a large number of mules and horses over said through
12 line from Cincinnati to certain points eastwardly, made a written proposition, dated the 30th day of August, A. D. 1861,

for and on behalf of your orators, and delivered the same to the defendant, in substance and to the effect following, namely: that your orators would transport all the mules and horses; that Thomson and Groom, and such other persons as they might be interested with, might ship within the then next 40 days from Cincinnati via Columbus and Steubenville, or below Pittsburgh and Harrisburgh, to Baltimore, at the rate of (120) dollars per car from Cincinnati to Baltimore, or (113) dollars per car from Cincinnati to Harrisburgh; Messrs. Thomson and Groom, and their associates clerks and managers, to be passed free on business connected with the shipments between Cincinnati and Pittsburgh, and their hands to be passed free on stock trains, with the stock, and returned free on passenger trains from Pittsburgh to Cincinnati, passes east of Pittsburgh to be issued in accordance with the custom of the Pennsylvania railroad, said agent agreeing that he would endeavor to induce said Pennsylvania railroad to furnish the same passes agreed to be furnished as aforesaid west of Pittsburgh, bedding for stock to be furnished, as customary with any of the western railroad companies, horses to be shipped in covered cars, sufficiently ventilated in the event of any damages occurring in any of the lines named west of Pittsburgh, by which transportation over them should be suspended; your orators to furnish transportation by
13 other routes, on the same terms; that for the transportation of said horses and mules William Stewart, agent of your orator, the said Steubensville and Indiana Railroad Company at Pittsburgh, be authorized to draw on defendant at the Bank of the Metropolis, Washington, D. C., at one day's sight, for each shipment separately as forwarded from Pittsburgh; said drafts to be paid promptly with exchange on New York; that on the same day the def't, in writing at the foot of said proposition, accepted the same by subscribing to said acceptance the name of "Thomson and Groom;" and on the same day, as part of the same transaction, the def't, by his certain agreement in writing, delivered to him by your orators' said agent at Cincinnati, at the same time with the delivery of the acceptance of said proposition, as aforesaid, his own proper signature being thereto attached, agreed to and with your orators as follows, namely: That in pursuance of a contract for the transportation of horses and mules, made by Thomson & Groom with L. Devinney, G. ag't, that day, meaning the contract concluded as aforesaid with your orators, upon the proposition and acceptance thereof as aforesaid, he, the said defendant, did thereby authorize William Stewart, ag't P. C. N. C. R. R., meaning the agent of your orator, the Steubenville and Indiana Railroad Company at Pittsburgh, to draw on him, the said defendant, at the Bank of the Metropolis, Washington, D. C., payable in exchange on New York for the costs of transportation of each shipment
14 of said Thomson and Groom through from Cincinnati to Baltimore and Harrisburg, as such shipments should be forwarded from Pittsburgh; and your orators aver and charge that the said def't, availing himself of his contract and agreement aforesaid, and within the time limited thereby, caused to be delivered on board the cars at Cincinnati aforesaid, belonging to the through line of which

your orator's said roads constituted parts as aforesaid, a large number of mules to be transported under and in pursuance of said contract; and the same were received and transported in conformity with said contract and in fulfilment of the terms thereof, on the part of your orators as follows: that is to say, on the 28th day of Sept., A. D. 1861, (12) cars of mules, from Cincinnati to Harrisburgh, passing over the road of your orator, the Central Ohio Railroad Company; on the 29th day of September, A. D. 1861, seven (7) cars of mules, from Cincinnati to Harrisburgh, passing over your said orator's said road on the 30 day of Sept., A. D. 1861, (7) cars of mules, from Cincinnati to Harrisburgh, passing over your said orators' said road; that your orators caused said cars of mules above mentioned, in all (26,) to be transported, in conformity with said contract, from Cincinnati to Harrisburgh, and paid to the connecting roads, in effecting said transportation, the freight and charges over their roads, according to the course of business in such cases, and in conformity with said
15 contract, became entitled to recover from the def't the sum of $2,953 60 in payment therefor in the mode and manner stipulated for in said contract; that the said (26) cars of mules were, on the 1st day of October, A. D. 1861, forwarded from Pittsburgh to Harrisburgh in due course of transportation, and on that day the said Wm. Stewart, agent as aforesaid at Pittsburgh, by the authority aforesaid of the defendant, and by the direction of your orators, made a draft or order in writing upon the def't, addressed to him at the Bank of the Metropolis, Washington, D. C., dated the day and year last aforesaid, and thereby then and there directed and requested the defendant, one day after sight, to pay to the order of D. Robinson, cas., $2,953 60 in New York exchange, which said draft afterwards, on the 4th day of October, A. D. 1861, was by the def't, on sight thereof, duly accepted, but your orators aver and charge that the def't, although requested so to do, did not at the maturity of said draft pay the same either in money or exchange on New York, or otherwise however, nor hath he at any time since that time paid the same or any part thereof; that said draft was made payable to the order of said D. Robinson, cas., in trust for the use of your orators, for the convenience of collection merely, the said Robinson having no beneficial interest therein whatever, being the holder of the naked legal title thereof merely for the use of your orators as aforesaid, and the same is in the possession of your orators as the equitable
16 owners thereof, and as such entitled to demand and receive payment thereof the defendant; that in further fulfilment of said contract, there was delivered by the defendant, and transported as aforesaid, on the 1st day of October, in the year of our Lord one thousand eight hundred and sixty-one, eight cars of mules from Cincinnati to Harrisburgh, passing over the road of your orator, the Central Ohio Railroad Company; on October 3, 1861, seven cars of mules, from Cincinnati to Harrisburgh, passing over your said orators' said road, and on the 3d day of Oct. aforesaid 4 cars of mules, from Cincinnati to Harrisburgh, passing over the road of your orator, the Steubensville and Indiana Railroad Company; that your orators

caused said (19) cars of mules, last above mentioned, to be transported, in conformity with said contract, from Cincinnati to Harrisburgh, and paid to the connecting roads, in effecting said transportation, the freight and charges over their roads, according to the course of business in such cases and in conformity with said contract, became entitled to receive from the def't the sum of $2,158 40 in payment thereof, in the mode and manner stipulated for, according to said contract; that the said 19 cars of mules were, on the 4th day of October, A. D. 1861, forwarded from Pittsburgh to Harrisburgh, in due course of transportation; and on that day the said Wm. Stewart, agent as aforesaid of the def't, by the direction of your orators at Pittsburgh, and by the authority aforesaid of the def't, made a draft or order in writing upon the defendant, addressed to him at Bank of Metropolis, Washington, D. C., dated the day and
17 year last aforesaid, and thereby then and there directed and requested the defendant, one day after sight, to pay to the order of D. Robinson, cas., $2,158 40 in New York exchange, which said draft afterwards, on the 7th day of October, 1861, was by the def't on sight thereof accepted, but your orators aver and charge that the def't, although requested so to do, did not at the maturity of said draft pay the same either in money or exchange on New York, or otherwise however, nor hath he at any time since that time paid the same nor any part thereof; that the said draft was also made payable to the order of the said D. Robinson, cas., in trust for the use of your orators, for the convenience of collection merely; that said Robinson having no beneficial interest therein, and being the holder of the naked legal title thereof merely for the use of your orators as aforesaid, and the same is in the possession of your orators as the equitable owners thereof, and as such entitled to demand and recover payment thereof from the def't; that in further fulfilment of said contract, there was delivered by the def't, and transported as aforesaid, on the 6th day of Oct., A. D. 1861, (12) cars of mules, from Cincinnati to Harrisburgh, passing over the road of your orator, the Steubensville and Indiana Railroad Company; that your orators caused said 12 cars of mules, last above named, to be transported, in conformity with said contract, from Cincinnati to
18 Harrisburg, and paid to the connecting roads, in effecting said transportation, the freight and charges over their roads, according to the course of business in such cases, and became entitled to recover from the def't the sum of $1,669 20 in payment therefor, in the mode and manner stipulated for, according to said contract; that said 12 cars of mules were, on the 8th day of October, A. D. 1861, forwarded from Pittsburgh to Harrisburgh in due course of transportation; and on that day the said defendant, by the said William Stewart, ag't as aforesaid at Pittsburgh, acting by virtue of the authority of the def't, conferred and given as aforesaid, made his draft or order upon, and addressed to the def't himself, at Bank of Metropolis, D. C., for the payment of the sum of $1,669 20, one day after sight thereof, to the order of D. Robinson, cas., in New York exchange; that said draft was afterwards, to wit, on the 12th day of October, 1861, duly presented and shown to the def't, to wit, at the

Bank of Metropolis, Washington, D. C., and by reason of the premises that the def't became liable to pay the same to the said payee thereof one day after the same was so presented and shown to him as aforesaid, without any formal or special acceptance thereof by him, the same being drawn as aforesaid by his own procuration, and for the consideration herein set forth as aforesaid, upon himself, but your orators aver and charge that the said def't did not at the maturity of said draft, or at any time since that time, although often
19 requested so to do, pay the same or any part thereof, either in money or exchange on New York, or otherwise however; that said last-named draft was also made payable to the order of said D. Robinson, cas. in trust for the use of your orators, for the convenience of collection merely, the said Robinson having no beneficial interest whatever therein, and being the holder of the legal title thereof merely for the use of your orators as aforesaid, and the same is in the possession of your orators as the equitable owners thereof, and as such entitled to demand and receive payment thereof from the def't. Your orators aver that all three of said drafts were drawn as above set forth in consideration of the transportation of mules, under said contract, and for no other consideration whatever, and in strict conformity with the terms and conditions of said contract; and that your orators, being the holders of said drafts, and the equitable owners thereof only, the legal title thereof being in the said D. Robinson, cas. are without remedy at law to coerce payment of the amount due thereon, and can only be equitably relieved in the premises by the aid of your honorable court in equity sitting, in consideration of which premises your orators pray that the said def't, being subject to the jurisdiction of the court, as herein above set forth, be ruled to answer this your orators' bill of complaint fully and particularly upon his corporal oath, and especially—

20 First. Whether your orators, by their said agent, L. Devinney, at Cincinnati, did not submit to him the said proposition above referred to, dated August 30, 1861, and whether he the said def't did not on that day, or at some time, and when, accept said proposition, as above in this bill of complaint the same is charged and stated.

Second. Whether he the said def't did not at the time of so accepting said proposition, or at some time, and when, and as a part of the same contract and transaction, deliver to the said L. Devinney, your orators' said agent at Cincinnati, his agreement in writing over his own proper signature, authorizing and empowering the said Wm. Stewart, agent, &c., at Pittsburgh, to draw on him the said def't for the costs of transportation of shipments under said contract, as in that behalf in this bill of complaint the same is charged and set forth, or how otherwise.

Third. Whether, in pursuance of the contract so made and entered into, he the said def't did not deliver or cause to be delivered on board of the cars at Cincinnati, at the times in that behalf herein above stated and set forth, or at some time or times, and when in particular, the several numbers of car-loads of mules herein above

stated and averred to be carried and transported upon said through line, and over the roads of your orators, in pursuance of said contract, or how otherwise.

Fourth. Whether the said car-loads of mules were not transported from Cincinnati to Harrisburgh pursuant to the direction of the def't, and pursuance of the authority conferred, as aforesaid, by him
21 upon the said Wm. Stewart, agent, &c., at Pittsburgh, the three drafts herein above mentioned, were not drawn by the said Wm. Stewart acting in that behalf for and as the agent of the said def't, as herein aforementioned, for the said several shipments of the said mules, as the same were forwarded from Pittsburgh, or if otherwise, how or for what other consideration were said drafts drawn.

Fifth. Did not he the said defendant accept the two first-named of said drafts, at the days and times above in this bill of complaint stated and set forth, or how otherwise, one of said drafts bearing date October 1st, 1861, for the sum of $2,953 60, and the other bearing date Oct. 4th, 1861, for the sum of $2,158 40.

Sixth. Was not the said third draft, bearing date October 8, 1861, for the sum of $1,669 20, presented and shown to the def't on the 12th day of October, 1861, at the Bank of Metropolis, in the city of Washington, D. C., or if not presented on that day, on what other day was it presented and shown at said bank, or elsewhere, to him, or otherwise, for his acceptance.

Seventh. Whether your orators are not the equitable owners of said several drafts, and entitled to demand and receive payment thereof from the def't; whether any part of the same has ever been paid by the def't, and is not the whole amount of money therein specified, with interest thereon, according to the tenor and effect of said drafts, due and owing by the def't to your orators, or how otherwise?

And on the hearing your orators pray that the def't be ad-
22 judged and decreed to pay to your orators the said several sums of money in said several drafts specified, with interest upon each according to the tenor and effect of said drafts, severally. And may it please your honors to grant to your orators such other and further relief as shall be equitable in the premises.

CHARLES B. GODDARD,
HUNTER & DAUHERTY,
Attorneys for Complainants.

Motion.

And afterwards, to wit, on the 6th day of April, A. D. 1863, a motion was made by the defendant to continue this case until the next regular term, and for leave to plead, answer, or demur, on the ground of loss of books and papers, and inability to prepare case, by reason of rebel invasion of Mt. Sterling, Ky. Taft & Perry, for defendants.

Motion.

And afterwards, to wit, on the 6th day of May, in the year last aforesaid, being at the April term of said court, on motion to the court by respondent's counsel, the default for answer herein is hereby set aside, and it is ordered that said respondents have ninety days in which to file his answer. And on further motion of def't, it is ordered that this case stand continued, at said defendant's costs, for this term.

Subpœna.

And afterwards, to wit, on the 29th day of August, A. D. 1863, came the defendant and filed a precipe for a subpœna in chancery, which was accordingly issued in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Southern District of Ohio, ss:*

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon the Central Ohio Railroad Company and the Steubenville and Indiana Railroad Company, 23 citizens of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the U. S. for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in October next, to answer a certain cross bill in chancery, filed and exhibited in said court against them by Harrison Thomson. Hereof they are not to fail under the penalty of the law thence arising, and have you then there this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the United States, this 29th day of August, A. D. 1863, and in the 88th year of the independence of the United States of America.

Attest: J. H. GEIGER, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this writ in the clerk's office of said court on or before the first Monday of October, A. D. 1863, otherwise the said bill may be taken *pro confesso.* J. H. GEIGER, *Clerk.*

And also on the day and year last aforesaid came the def'ts aforesaid, and filed their certain answer and cross petition herein, which is in the words and figures following, to wit:

Answer and cross-petition.

In the circuit court of the United States for the southern district of Ohio.

The answer and cross petition of Harrison Thomson to the bill of complaint of the Central Ohio Railroad Co. and the Steubenville and Indiana Railroad Co. herein filed against him.

Harrison Thomson, the defendant, reserving to himself all right of exceptions to said bill of complaint, for answer thereto says. that it is true that compl'ts commenced their civil action in the
24 court of common pleas of Muskingham county against this defendant, and that the same was removed to this court, substantially as stated in the bill of complaint. That it is also true that defendant entered into a contract with complainants for the transportation of mules and horses, substantially as stated in complainant's bill of complaint. That the defendant answers the interrogatories in the bill of complaint numbered 1. 2, 3, 4, 5. 6, in the affirmative, subject to the reservations and qualifications after stated. That as to the 7th interrogatory of said bill, defendant is unable to answer from any knowledge, information, or belief, except as he finds the matter stated in the bill, and has no knowledge or belief that it is untruly stated; but the defendant further says that it is not true that the contract stated in the bill was fulfilled by the complainants, or that the complainants are in equity or justice entitled to have or recover anything from the defendant by reason of the premise; on the contrary, the defendant, while he admits that complainants did transport some of the animals contracted to be transported as alleged in the bill, yet he says that complainants neglected and refused to do their duty as to other portions of said contract, and neglected and refused to transport animals to be transported under such contract in such manner as to cause this defendant great delay, expense and damage; that complainants transported other ani-
25 mals received by them, and to be transported under said contract, in unsuitable cars, and in a negligent manner, by reason of which the animals got crippled, depreciated, and ruined, to the great damage of the defendant. And further, that complainants delayed and stopped other portions of the animals undertaken to be transported under said contract, without suitable accommodations, and at inconvenient places, by reason of which many of the animals were greatly depreciated, and the def't greatly damaged, as after stated. That defendant, when said contract with complainants was entered into, and afterwards, during the transaction after stated, was engaged in furnishing the government of the United States, under contracts to that end, large numbers of horses and mules for army purposes, which fact was known to the complainants and their agent at that time, and the contracts for transportation were entered into with reference to this state of facts; that the horses and mules purchased by defendant, and undertaken to be transported by complainants, were not purchased, or to be transported, with a view to

sale or market generally, but to supply the government at prices fixed and agreed upon; that there was no separate contract for transporting the lots mentioned in the bill of complaint, but the same were taken and transported under the general contract, in the same general transaction with numerous other lots transported by com-
26 plainants under the same contract. That defendant, on the 31st day of August, A. D. 1861, had in Cincinnati, ready to be transported under said contract, 283 horses, and then and there requested of complainants to provide transportation for the same under said contract. That on the evening of said day complainants took upon cars for transportation, and transported, 201 of said horses, leaving on defendant's hands, to be provided for until transportation should be furnished, 82 of said horses, which complainants neither did nor would provide transportation for until the evening of the day of September 5th, compelling defendant to provide and care for said horses for a period of five days; that on the 3d day of September, 1861, def't, in the regular pursuit of his said business, had purchased 32 horses, which he then and there, at Cincinnati, had ready for transportation, and requested complainants to furnish cars for, and transport the same under said contract; but complainants neither did nor would furnish cars, or accept said horses for transportation, until the evening of the 5th day of Sept., leaving them on defendant's hands, to be provided and cared for 2 days, at his expense. That on the 4th day of Sept., 1861, def't, in the regular course of his said business, had purchased, and had ready, in Cincinnati, for transportation, 52 more horses, and then and there requested complainants to furnish transportation for the same, according to the stipulations of said contract; but complainants neither did nor would furnish transportation for the same until the evening
27 of the 5th day of Sept. aforesaid, leaving on the defendant's hands to be provided and cared for 1 day. That on said 5th day of Sept. defendant had purchased, and had ready for transportation, in Cincinnati, 14 horses more, and then and there requested said complainants to furnish cars for and transport the same under said contract. That on the evening of said 5th day of Sept. said horses had accumulated on def't's hands to the number of 181, and cars were then furnished, and all said horses accepted by complainants for transportation except 1, which complainants neither did nor would take and transport. That by reason of the failure of complainants to transport said horses, as the same were ready for transportation, defendant was wrongfully, and against the spirit of his said contract, compelled to keep said horses in Cincinnati, awaiting transportation, at great expense, to wit, an expense of fifty cents a day for each horse, and was thus greatly damaged and put to loss, viz:

82 horses five days	$205 00
32 horses two days	32 00
52 horses one day	26 00
	263 00

That defendant was compelled to keep and care for the horse left on his hands, as aforesaid, until complainants provided transportation, as after stated. And in the regular course of his business def't purchased, and had ready in Cincinnati, for transportation, under
28 said contract, on the several days mentioned, the number of horses named, viz, on the 6th day of September 125 horses, on the 7th day of Sept. 21 more horses, and on the 9th day of Sept. 85 more, making in all, accumulated on his hands, at the last date, 232 horses. That on said 6th, 7th, and 9th days of Sept. defendant requested complainants to provide transportation for, and transport according to said contract, so on said days respectively ready for transportation, but the complainants neither did nor would furnish cars or provide transportation for all or any of said horses until the evening of the 9th of Sept. aforesaid, when complainants did provide cars and accept for transportation 112 of said horses only. That def't was thus unjustly compelled to provide and care for, since the shipment of Sept. 5th last, aforesaid, 1 horse for 4 days, 125 horses for 3 days, and 21 horses for 2 days, at his great expense, and to his great damage, to wit, an expense and damage of fifty cents a day for each horse, in all, an expense of $\$210\frac{50}{100}$. That 120 horses, ready for transportation, were thus left on def't's hands, to be provided and cared for until transportation should be provided, as after stated. That def't, in the regular pursuit of his business, purchased, and had ready for transportation, in Cincinnati, on the 10th day of Sept. aforesaid, 21 more horses, and on the 11th day of Sept. aforesaid 10 more horses, and on the 12th day of the same month 2 more horses. and on said 10th, 11th, and 12th days of Sept. notified and requested complainants to furnish transportation for the horses, so on hand and ready for transportation, according to the terms of said contract; but complainants neither did nor would furnish any more
29 transportation until the evening of the 12th day of Sept. aforesaid, when complainants furnished cars for and accepted for transportation 112 only of the horses then on hand, ready and awaiting transportation, leaving 41 horses on the hands of def't; that, since the last shipment preceding, complainants had thus unjustly compelled def't to keep on hand and provide for 120 horses for 3 days, 21 horses for 2 days, and 10 horses for 1 day, to the great expense and damage of def't, to wit, the expense and damage of fifty cents a day for each horse, making an aggregate sum of ($206.) That complainants neither did nor would furnish transportation for the 41 horses, so left on deft's hands, until and except as after stated. That def't, in the regular course of his said business, purchased and had ready, in Cincinnati, for transportation, under said contract, on the 13th day of Sept. aforesaid, 48 horses more, and on the 15th day of Sept. 43 horses more, and on the 17th day of the same month 17 horses more, and on said 13th, 15th, and 17th days of Sept., respectively, def't notified and requested complainants to provide transportation, and transport the horses so on hand, and ready to be transported, according to the contract; but complainants neither did nor would furnish transportation for or transport any of said horses

until the evening of the 25th of Sept., when complainants furnished cars and took on board for transportation 112 of said horses only, leaving on deft's hands 37 horses, ready and awaiting transportation. That complainants thus compelled def't to provide and care for, at his own expense and damage, awaiting transportation, 41 horses for 8 days, 48 horses for 7 days, 43 horses for 5 days, 17 horses for 3 days, at an expense and damage to def't of a large sum, to wit, the sum of fifty cents a day for each horse, amounting in all to $445. That for the 37 horses thus left on def't's hands, awaiting transportation, complainants neither did nor would provide transportation until except as after stated. That defendant, in the ordinary course and regular prosecution of his said business, on the 21st day of Sept. aforesaid, had purchased, and had ready, in Cincinnati, for transportation, under said contract, 23 other horses, and on the 29th day of the same month 72 other horses; that def't, on said 21st and 29th days of Sept., notified and required complainants to provide cars and transportation, and transport the said horses so on hand and awaiting transportation, according to the stipulations of said contract; but complainants neither did nor would furnish cars or transport or accept for transportation said horses until the evening of October the 18th, 1863, when complainants took on cars, for transportation, 14 only of said horses, leaving 118 on def't's hands, for which complainants neither did nor would provide transportation; that defendant kept said horses awaiting and ready for transporcation under said contract until October 21st, 1861, when he sansed 50 of said horses to be sent away, and the next day tent off the remaining horses in another direction, and by other means of conveyance, in despair of procuring them to be transported by complainants in a reasonable time under said contract. That defendant was thus compelled, while awaiting transportation of the horses so left on his hands, and before cars were furnished by complainants, and before sending them from Cincinnati by other means, to provide for 37 horses for 5 days, 23 horses for 27 days, 72 horses for 19 days, 16 horses for 23 days, 118 horses for 3 days, and 68 horses for 1 day, at an expense and damage to himself of a large sum, to wit, fifty cents a day for each horse, amounting to $1,571. That further, in the regular course of his said business, defendant, on the 5th day of Sept., 1861, had bought and had ready for transportation at Cincinnati, under said contract, 151 mules and 2 horses, and then and there notified and requested complainants to provide cars and transport said mules and horses as by the contract provided; but defendants neither did nor would provide cars or transport them until the evening of Sept. 9th aforesaid, leaving them on def't's hands to be provided and cared for 4 days before they were transported. That on the 15th day of Sept., 1861, def't had bought, and had ready for transportation, in the regular course of his said business at Cincinnati, 227 mules and 6 horses, and then and there notified and requested complainants to provide cars and transport said mules and horses according to the terms of said contract; but complainants neither did nor would provide cars and transport said mules and horses until the

evening of the 23 of Sept. aforesaid, thus compelling defend-
32 ant to provide and care for them 8 days awaiting transportation. That defendant, in the regular pursuit of his said business, had bought and had ready for transportation, under said contract, on the 16 day of Sept. aforesaid, at Cincinnati, 294 mules and 3 horses, and defendant then and there notified and requested complainants to provide cars for and transport said mules and horses as provided in said contract; but complainants neither did nor would provide cars or transport said mules until the evening of the 22d day of Sept. aforesaid, thus compelling said defendant to provide and care for said mules and horses so awaiting transportation 6 days. That in the regular course of his said business, defendant bought and had ready for transportation, on the 26th day of Sept. aforesaid, at Cincinnati, 157 mules and 3 horses, and then and there requested complainants to furnish cars and transportation for said mules and horses according to the tenor of the contract; but complainants neither did nor would furnish cars and transport said mules and horses until the evening of the 29 day of the same month, thus compelling def't to provide and care for said mules and horses awaiting transportation 3 days. That defendant, in the regular prosecution of his said business, purchased and had ready for transportation, on the 27th day of Sept. aforesaid, at Cincinnati, 136 mules, which defendant then and
there notified and requested complainants to furnish cars for
33 and transport according to said contract; but complainants neither did nor would furnish cars for or transport said mules until the evening of the 29th day of the same month, compelling def't to provide and care for said mules 2 days awaiting transportation. That defendant, in the regular prosecution of his said business, purchased and had ready for transportation at Cincinnati, on the 16th day of Sept. aforesaid, 169 mules and 2 horses, and then and there requested complainants to furnish cars for and transport the same according to said contract; but complainants neither did nor would furnish cars for or transport said mules and horses until the 18th day of the same month, thus compelling defendant to provide and care for them 2 days awaiting transportation. That in the said regu'ar course of his business, def't, on the 1st day of Sept. aforesaid, had purchased and had ready for transportation, at Cincinnati, 238 mules and 2 horses, and then and there requested and notified complainants to provide cars and transportation for the same under the said contract; but complainants neither did nor would furnish cars for or transport said mules and horses until the evening of the 2d day of the same month, thus compelling def't to provide and care for them 1 day awaiting transportation. That the defendant, in his regular prosecution of his said business, on the 23d day of Sept., had bought and had
ready for transportation, at Cincinnati, 239 mules and 3 horses,
34 and then and there notified and requested complainants to provide cars for and transport the same under said contract; but complainants neither did nor would provide cars or transport the same until the evening of the 2d day of October, 1861, thus compelling def't to provide for said mules and horses 9 days awaiting transporta-

tion. That on the 25th day of Sept. aforesaid the def't, in the regular prosecution of his said business, bought and had ready, in Cincinnati, for transportation, 80 mules, and then and there requested and notified complainants to provide cars for and transport them under said contract; but complainants neither did nor would provide cars for or transport said mules until the evening of the 29th day of said month, compelling defendant to provide and care for them 4 days awaiting transportation. That the expense of providing and caring for said several lots of mules while awaiting transportation, with the few horses accompanying them, which defendant was thus wrongfully compelled to incur by the neglect of complainants to furnish transportation at the proper times, as aforesaid, was a large sum, to wit, the sum of 40 cents a day for each mule and horse so delayed, to wit:

153 head, 4 days, at 40 c	$244	80
233 head, 8 days, at 40 c	745	60
297 head, 6 days, at 40 c	712	80
160 head, 3 days, at 40 c	192	00
35 136 head, 2 days, at 40 c	108	80
141 head, 2 days, at 40 c	112	80
240 head, 1 day, at 40 c	96	00
242 head, 9 days, at 40 c	871	20
80 head, 4 days, at 40 c	128	00
	3,212	00

That in addition to the expense of providing and caring for said mules while awaiting transportation, there was, while so awaiting, an inevitable and unavoidable loss in flesh and general deterioration of condition, amounting in the aggregate to a large sum, in which def't was thus damaged, to wit, the sum of one thousand dollars. That complainants, after taking on for transportation the lot of 294 mules and three horses before described as taken, on the evening of 22d day of Sept., and proceeding as far as Columbus, Ohio, towards their destination, stopped the train on which they were being transported at Columbus, on or about the 23d day of Sept., and neither did nor would at that time transport them further, but, against the wishes and protestations of def't's agent, turned said mules off the cars chosen and provided by complainants, but the gates of the enclosure of which were insecure and insufficiently closed and fastened. That the complainants neither did nor would provide transportation further for this lot for a long period, to wit, a period of 5 days, and neither did nor would provide food and water for them, or adequately protect and keep up and fastened the gates of the enclosure. That while in this con-
36 dition said mules got out of the enclosure and scattered off through the country to a great distance. That defendant's agents were, by reason of the premises, compelled, at great cost, expense, and trouble, to procure and furnish food and water for said animals, and to search for and pursue them through the country and hire assistance in finding and getting them back to the depot at Colum-

bus. That def't's agents were unable to find or recover a portion of said animals, and seven mules, of the value of $125 per head, were lost, to the damage of def't $875. That many others of said animals were in their excursions long without food, and then finding it, ate greedily and died of the effects. Three died by reason of this stoppage at Columbus from the causes above mentioned or from injuries occasioned by said stoppage unknown to this def't, worth $125 each, and many more were greatly deteriorated in flesh and general condition. That def't suffered damage and expense by reason of said stoppage, and the circumstances attendant, above described, in a large sum, to wit, the sum of two thousand dollars. That in transporting the several lots of mules taken by complainants for transportation at the several dates before mentioned for this def't, complainants, def't is informed and believes, in every instance, that is to say, on the arrival of every train containing def't's mules, at Pittsburgh, stopped them and turned the animals into places provided by complainants and detained them there, huddled in muddy pens, where they could be fed only with difficulty and with great waste and de-
37 struction of food, and refused either to provide for them or furnish transportation until a lapse of several days. That some car-loads were detained a greater and some a smaller number of days, ranging from two days to 10 days, and averaging a detention there of one week; that defendant was thus compelled to buy feed and care for them at great expense, and they were kept in a condition where deterioration of general condition and flesh was unavoidable, and defendant, by expense and trouble of feeding them, and by deterioration of the animals so detained, was damaged in a large sum, to wit, $6,000. That the trains of cars transporting the several lots of horses transported by complainants for def't under said contract were also stopped at Pittsburgh, and the horses detained there in rainy, bad weather in pens provided by complainants, which were muddy and without shelter, and where the horses could not rest nor be fed suitably. That complainants neither did nor would furnish transportation for taking forward said horses until they had been detained there many days, nor did nor would complainants feed said horses while so detained. That the lot of horses shipped at Cincinnati
38 as before described as shipped on September 9, and the lot described as shipped on September 12, and the lot described as shipped on September 20, consisting of 112 horses in each lot, were all detained in Pittsburgh, each lot 5 days, in the manner above described. That defendant was put to great expense and trouble to provide and care for them, and was unable, in such muddy pens, to make them comfortable or prevent great deterioration in flesh, general appearance, and condition, and many of said horses were so deteriorated by said detention as to be afterwards unfit and unavailable for the purposes for which purchased, as before described, and could not be used in filling government contracts. That many of said horses, while detained there, stand in mud and rain, took cold and became sick by reason thereof. That defendant, by reason of said detention, the expense and trouble of caring for them, and the

deterioration by exposure and discomfort of the horses so detained at Pittsburgh, suffered loss and damage in a large sum, to wit, the sum of eight thousand dollars ($8,000.) That in the lot of horses before mentioned as shipped at Cincinnati on the 12th of September, and in the lot shipped on the 20th of
39 Sept., was each one horse crippled and mutilated in passing from Cincinnati to Pittsburgh. That, by reason of the unsuitableness of the car, these horses caught their feet, or one foot each, in an opening, and were thus ruined for the purposes for which they were intended by def't, to his damage $200. That complainants refused to furnish bedding, as stipulated in said contract, for any of the horses and mules so transported, and defendant was obliged to purchase and supply the same at his own expense. That it is customary with several of the western railroad companies, to wit, to furnish bedding for stock so transported. The defendant, by reason of complainants' failure and refusal to furnish bedding for said animals, was damaged in the sum of $136. That complainants neither did nor would furnish, according to said contract, to defendant and said Groom and their associates, clerks and managers, or otherwise pass them free on camplainants' road on business connected with said shipments between Cincinnati and Pittsburgh, nor use their influence with the Pennsylvania R. R. to furnish passes as stipulated, but defendant was compelled to buy tickets, which by said contract
40 should have been furnished free, to the amount of $150. That defendant had a contract with the United States government to deliver said horses and mules, and when delivered to be paid therefor $120 per head for each horse, and $125 for each mule. That by reason of the several delays in transportation the defendant was prevented, to the extent of such delays, from delivering and receiving pay for said animals, and kept out of the use and interest and price thereof during the term of said respective delays, and by reason thereof was damaged in a large sum, to wit, the sum of one thousand dollars ($1,000.)

Amendment.

The said Harrison Thomson admits to be true, as stated in the petition, that plaintiffs made to him the proposition, as in the bill set forth, on the 30th day of August, 1861, and that on the same day defendant accepted the same in writing, by subscribing thereto the name Thomson & Groom, and admits that on the same day, and as part of the same transaction, this defendant signed and delivered to the plaintiffs the agreement set forth in the bill to accept bills as therein stated, and he admits that the contract to transport for Thomson & Groom, mentioned in the latter contract, was the
41 same, and no other or different, before referred to for transporting stock for Thomson & Groom and their associates. This defendant further says that the only consideration for the bills so to be drawn and accepted was the fulfillment by the plaintiffs of their part of said contract for transportation according to the terms thereof. This defendant further says that all the horses and mules

mentioned in this defendant's original answer and cross-bill as having been offered to plaintiffs for transportation, and concerning which complainants are made in the original answer and cross-bill of the non-fulfillment of said contract by plaintiffs, and of negligence, delay, and damage, as therein set forth, were horses and mules owned by said Thomson & Groom, and other persons with whom they were interested, and were offered to be shipped as such, and were in all respects such as by said contract plaintiffs had bound themselves to transport, and as this defendant had a right to offer for transportation under said contract; that since the time limited in said contract for transporting the stock referred to, and since the close of the transactions involved in said several shipments, actual and intended, as set forth in the original answer and cross-bill, and before the commencement of this suit by the plaintiffs, the said Groom and each and every other person interested with said Groom and this defendant in any of said horses and mules shipped or offered to be shipped, as stated in the original answer and cross-bill, under said contract, have turned over and assigned to this defendant, respectively, all their rights, claims, liabilities, and interest, in or to said contract with plaintiffs for transportation, and in or to all claims for damages against the plaintiffs for its non-fulfillment, and in and to all defenses and legal or equitable rights growing out of said contract in connection with said bills of exchange, or otherwise; and this defendant was, at the time of the commencement of this action by the plaintiff, and ever since has been, the sole and exclusive representative and owner of all of said rights and interests, and is solely and exclusively entitled to the benefit of any defence growing out of the circumstances stated as against the claim of the plaintiff, and is solely and exclusively entitled to assert, by cross-bill or otherwise, as he may be advised, the claim for recoupment or damages described in the original answer or cross-bill, or any and all other claims which have arisen or may arise out of the transaction referred to as against the plaintiff. That drafts were not drawn on this defendant for said transportation at sight for each shipment separately, as forwarded from Pittsburgh, but were drawn irregularly for several shipments in lump. That defendant, besides the shipments hereinbefore mentioned and those mentioned in complainants' bill, shipped other horses and mules under said contract, and did not, nor does now deny his obligation to pay for said transportation, and did accordingly accept and pay many bills, to an aggregate amount of $———. But defendant has and does claim to recoup and recover the amount of his expenses and damages, hereinbefore described and set forth, to wit, the sum of $24,393$\frac{50}{100}$. The defendant prays that this answer may be taken as a cross-bill against said the Central Ohio Railroad Company and said the Steubenville and Indiana Railroad Company; that subpœnas may issue against them respectively, and that at the final hearing hereof the defendant may be decreed to recoup and recover from the said railroad companies said amount of $24,393$\frac{50}{100}$; that complainants may be decreed to deliver into court, to be canceled, the three bills

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described in the petition, as drawn by the defendant, and that complainants be decreed to refund and pay to defendant the balance of his said damage and expenses, to wit, the sum of $\$17,612\frac{30}{100}$, or so much thereof as shall be found equitable, and that defendant recover of complainants his costs, and for other relief.

AARON F. PERRY, *Attorney for Defendant.*

SOUTHERN DISTRICT OF OHIO, *Hamilton County, ss:*

Personally appeared the above-named Harrison Thomson, and beeing sworn, makes oath and says that the several matters and statements in the foregoing answer and cross-bill, so far as stated from his personal knowledge, are true, and that all the other several matters and things therein stated are true, according to the best of his knowledge, information and belief.

HARRISON THOMSON.

Subscribed in my presence and sworn to before me this 29th day of August, 1863.

44 M. F. WILSON, *Notary Public.* [SEAL.]

Marshal's return of the subpœna.

And afterwards, to wit, on the first Monday in October, 1863, it being the day to which said writ of subpœna was made returnable, came the said marshal to whom the said writ was, in form aforesaid, directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings indorsed thereon in the words and figures following, to wit:

Served the within named Central Ohio Railroad Company, by handing to H. J. Jewett, president of said railroad company, a certified copy of this writ, on the 14th day of September, A. D. 1863.

A. C. SANDS, *U. S. Marshal S. D. O.*,
By ELIJAH BROWN, *Deputy.*

Service of the within writ acknowledged as to the Steubenville and Indiana Railroad Company.

HUNTER & DAUGHERTY,
Att'ys for said Company.

Served the within named Steubenville and Indiana Railroad Company, by Hunter & Daugherty, att'ys for said railroad company, acknowledging service as above, this 17th day of Sept., A. D. 1863.

A. C. SANDS, *U. S. Marshal S. D. O.*,
By T. D. BARTLETT, *Deputy.*

Motion.

And afterwards, to wit, on the 16th day of October, A. D. 1863, on motion of the plaintiffs, it is ordered that they have leave to file replication to the answer of the defendant, and also to answer to part of the cross-bill of the defendant, and to demur to part thereof, and said replication, answer, and demurrer are now filed. It is, however, reserved that the defendants may move the court, on or before Tues-

day next, to vacate this order and to remove from the files said replication, answer and demurrer, or either of them, for causes to be allowed by the court.

And thereupon, to wit, on the day and year last aforesaid, came the said complainants and filed in the clerk's office of the court
45 aforesaid their answer to the cross-bill in the premises, in the words and figures following, to wit:

Answer to cross-bill.

The joint answer of the Central Ohio Railroad Company and the Steubenville and Indiana Railroad Company to so much and such parts of the cross-bill of complaint of Harrison Thomson, embodied in the answer of the said Harrison Thomson to the original bill of complaint of these respondents, pending in the circuit court of the United States for the southern district of Ohio, against him, the said Harrison Thomson, as seeks to recoup, by the decree of said court, from the claim of these respondents, set forth in their said original bill, an equal amount of the damages and expenses alleged in his said cross-bill to have been sustained by him, the said Harrison Thomson, by reason of the causes therein set forth.

These respondents, saving to themselves the benefit of exceptions to the said cross-bill of complaint for and on account of the many errors and imperfections therein contained, for answer to so much and such part thereof as seeks to recoup an equal amount of damages from the demand of these respondents, for the recovery of which they have prayed the decree of this court in and by their said original bill of complaint, say and aver that they, these respondents, did not, by their contract and agreement, made and entered into as alleged and stated in their original bill of complaint, and to which reference is made in the cross-bill aforesaid, undertake, promise and agree to transport for the said Harrison Thomson, individually, any horses or mules; but only to transport all the mules and horses that Thomson & Groom, and such other persons as they might be
46 interested with, might ship within the period of forty days stipulated in said contract. And they deny that the said Harrison Thomson in his individual right did, in fact, under said contract, transport the said horses and mules in his said cross-bill alleged and stated to have been transported under said contract, and in respect to which he claims, pretends, and alleges to have sustained damages, and to have incurred expenses, by reason of the negligence or other acts of these respondents. And they aver and charge that if the said mules and horses, or any part of the same, alleged in said cross-bill to have been transported under said contract, were the individual property of the said Harrison Thomson, and not the property of the said firm of Thomson & Groom, and other persons interested with them, they were, by the fraud of the said Harrison Thomson, shipped or caused to be shipped and transported under color of said contract, without any right, by virtue thereof, so to do, or to cause the same to be done, and without the knowledge of these respondents of the fact, if such were the fact, that the said mules and horses, or

any part thereof, were the separate property of him, the said Harrison Thompson, and not of said firm of Thomson & Groom, and other persons interested with them. And these respondents are further advised and charge and insist, that if, in fact, said mules and horses, or any of them, that were in fact shipped or procured to be transported by the said Harrison Thomson under color of said contract, or otherwise howsoever, were in fact the individual property of the said Harrison Thomson, and not the property of the
47 said firm of Thomson & Groom, or of other persons interested with them, he, the said Harrison Thomson, hath not, in law or equity, any right to recoup from the claim asserted by these respondents against him by their said original bill of complaint, for or on account of any supposed damages sustained, or expenses incurred by him, in respect to said mules and horses, the separate property of him, the said Harrison Thomson, if any, by reason of the said alleged and pretended negligence or other acts of these respondents set forth in said cross-bill. And the respondents deny that they have been guilty of any negligence or other acts in the transportation of said mules and horses, for which they are in any way or manner liable in damages, either as for a breach of their said contract, or otherwise howsoever, or to be called to account therefor by way of recoupment as aforesaid, or otherwise, by the said Harrison Thomson. And these respondents further are advised and insist and charge, that if, in fact, said mules and horses, or any of them, that were in fact shipped and procured to be transported under color of said contract, were the property of said Thomson & Groom, or other persons interested with them, the said Harrison Thomson hath no right in equity to recoup for any damages or expenses incurred by him in respect to said mules and horses in manner and form as in and by his said cross-bill he prays it may be decreed to be done, for or on account of any supposed negligence or other acts of these respondents. And these respondents are advised, charge and insist, that if they are under any liability, (which they do not admit, and do deny,) by rea-
48 son of any acts by them or their agents done, suffered, or omitted to be done, in and about the transportation of the mules and horses of the said Thomson & Groom, or others interested with them, to respond in damages, such liability only exists in behalf of the said firm of Thomson & Groom, and other persons interested with them in that behalf, and not in behalf of the said Harrison Thomson, individually, either in the way of recoupment or otherwise. But these respondents are uninformed of the names of the individuals who composed the said firm of Thomson & Groom, except that of the said Harrison Thomson, at the time said contract was entered into, or when the same was in progress of being executed, and they are not advised of the christian name of the said Groom, or of the name of any of the other persons interested with them in said mules and horses, nor are they advised of the places of residence of said parties, except that of the said Harrison Thomson. And these respondents pray that the said Harrison Thomson answer, set forth and discover, under his corporal oath, what are the names in full and

the places of residence of all parties and persons interested with the said firm of Thomson & Groom in the said mules and horses, or any part thereof, in respect to which the said Thomson claims the right to recoup as aforesaid. And for this purpose these respondents pray that this their answer may be taken as a cross-bill to the said cross-bill of said Harrison Thomson.

These respondents, further answering, deny the truth of each and all of the several allegations of fact charged, set forth
49 or averred in the said cross-bill of the said Harrison Thomson, inconsistent with the truth of the facts alleged in the said original bill of complaint of these respondents. They further deny the truth of each and all other facts in said cross-bill alleged not responsive to said original bill, and which are set forth in said cross-bill as a basis for the relief thereby prayed, either by recoupment or otherwise, and they require proof of the truth thereof to be made by the said Harrison Thomson. And they further aver and charge that the said contract on the part of these respondents, in respect to the transportation of the said mules and horses therein referred to, was not meant, intended, or understood by the said L. Devinney as the agent of these respondents, or by the said Harrison Thomson at the time of the making of said contract, as in any manner obligatory or binding these defendants to be answerable in damages for negligence, casualty, or injury resulting to the said Thomson & Groom, or other persons interested in the said horses and mules, in the course of transportation thereof; but was, on the contrary thereof, meant, intended, and understood by the said Devinney and said Thompson as a stipulation limiting and fixing the amount of freight and exemptions from fare, &c., as therein mentioned. And these respondents aver and charge that after said contract was entered into, the said Thomson & Groom, in conformity with the purpose and intention thereof, as aforesaid, by express contract in writing entered between them and the Little Miami Railroad Company
50 and the Columbus and Xenia Railroad Company, whereby they hired from said companies the cars that were necessary for the transportation of said horses and mules, and upon and with which they were, in fact, transported by them at their own risk, except as to the motive power to be furnished by said last-named railroad companies, subject to the rates of transportation stipulated between said Thomson & Groom with these respondents.

GODDARD & BUNKER.
HUNTER & DAUGHERTY,
Sol's for Respondents.

THE STATE OF OHIO, *Muskingum county:*

In verification of the answer in chancery, above written, by the Central Ohio Railroad Company and the Steubenville and Indiana Railroad Company to the cross-bill of complaint of Harrison Thomson, in said answer particularly referred unto, the corporate seal of the said Central Ohio Railroad Company is hereto affixed, pursuant to a special order of the board of directors of said company.

Done at Zanesville, in the county aforesaid, this 13th day of October, A. D. 1863.

[SEAL.] By H. J. JEWETT,
President of said Board.

And thereupon, to wit, on the 16th day of October, A. D. 1863, the said complainants, by their attorneys, filed in the clerk's office of the court aforesaid their replication in the premises, in the words and figures following, to wit:

Replication.

The joint replication of the Central Ohio Railroad Company and the Steubenville and Indiana Railroad Company to the answer of Harrison Thomson to the bill of complaint of these repliants, pending in the circuit court of the United States for the seventh circuit and district of Ohio.

For replication to the answer aforesaid of the said defendant the said complainants say that all and singular the allegations of
51 fact in said answer of the defendant which are inconsistent with the truth of the facts set forth in the bill of complaint aforesaid are untrue, and they require proof thereof to be made by the said defendant, and they maintain and prove the truth of all and singular the allegations of their bill of complaint controverted or denied by the said answer of the defendant.

HUNTER & DAUGHERTY.
GODDARD & BUNKER,
Att'ys for Complainants.

And also on the said 16th day of October, A. D. 1863, come the said complainants, and filed in the clerk's office of the court aforesaid their demurrer to the cross-bill of defendant, in the words and figures following, to wit:

Demurrer to the cross-bill.

In the circuit court of the United States for the southern district of Ohio.

THE CENTRAL OHIO RAILROAD COMPANY and the Steubenville and Indiana Railroad Company, complainants,
vs.
HARRISON THOMSON, defendant. } In chancery.

The undersigned, counsel for the above-named complainants, certify that, in our opinion, the within demurrer of said complainants to the cross-bill of complaint of the defendant is well founded in law.

HUNTER & DAUGHERTY.

THE STATE OF OHIO, *Muskingum county, ss:*

H. J. Jewett, of lawful age, being duly sworn, says he is president of the board of directors of the Central Railroad Company, and that

the within demurrer to the cross-bill of Harrison Thomson is not interposed for delay.

H. J. JEWETT.

Sworn to by the said H. J. Jewett, and by him subscribed, before me this 13th day of October, A. D. 1863.

JAMES P. EGAN, *Justice of the Peace.*

The joint demurrer of the Central Ohio Railroad Company, and the Steubenville and Indiana Railroad Company to so much and such parts of the cross-bill of complaint of Harrison Thomson to the original bill of complaint of these demurrants, pending in
52 the circuit court of the United States for the southern district of Ohio, as seeks to recover by the decree of said court the balance of damages and expenses alleged in his said cross-bill to have been sustained and incurred by him for the causes therein set forth, over and above the amount due to these demurrants from the said Harrison Thomson, upon and for the causes in their said original bill of complaint alleged and set forth, and for the recovery of which they pray the decree of said court against the said Harrison Thomson, the defendant therein, which said balance is stated and set forth in said cross-bill to be the sum of seventeen thousand six hundred and twelve dollars and thirty cents.

These demurrants in nowise admitting any part of the allegations of the said cross-bill of the said Harrison Thomson, which is inconsistent with the truth of the allegations of their said original bill of complaint, to be true, but protesting that the same is false and untrue, they, these demurrants, do demur in law to so much and such parts of said cross-bill of complaint as seeks to recover the balance of damages and expenses thereby alleged to have been sustained and incurred by him, the said Harrison Thomson, upon and for the causes in their said original bill of complaint alleged and set forth, and for which they pray the decree of said court in that behalf against the said Harrison Thomson, the defendant therein; which said balance is stated and set forth in said cross-bill to be the sum of $17,612 $\frac{30}{100}$, and for cause of demurrer thereunto they say:

First. That it doth appear by and from the allegations and
53 statements of the said cross-bill that if the same be true in fact. he, the said Harrison Thomson, hath a plain and adequate remedy at law for the recovery of all such damages, if any, as he, the said Harrison Thomson, may have sustained for the causes in his said cross-bill set forth, including the balance, for the recovery of which he prays the decree of the court.

Second. That it doth appear by and upon the face of the said cross-bill that the said Harrison Thomson is not in equity entitled to draw these demurrants in question before this honorable court for any cause, matter, or thing relating to any supposed balance of damages aforesaid, alleged or pretended to have been sustained by him as set forth in his said cross-bill.

Wherefore these demurrants pray judgment and the decree of the

court that they be hence dismissed and discharged from any other or further liability to answer unto so much and such parts of said cross-bill as relate to the said claim for any balance of damages as aforesaid; and they pray that all and so much of said cross-bill as relates to said alleged and pretended balance of damages be adjudged and decreed to stand dismissed at the cost of the said Harrison Thomson.

GODDARD & BUNKER.
HUNTER & DAUGHERTY,
Counsel and Attorneys for Demurrants.

Entry.

And afterwards, to wit, on the 10th day of March, A. D. 1864, it being the February term of the said court, for the year last aforesaid, to which term this cause was continued, an entry in said cause was made in the journal of said court, in the words and figures following, to wit:

THE CENTRAL OHIO RAILROAD COMPANY and the Steubenville and Indiana Railroad Company
vs.
HARRISON THOMSON.
} In chancery.

54 This cause came on to be heard at our last October term, on the original bill of complaint, answer thereto and cross-bill of the lefendant, demurrer of the complainant to so much of said cross-bill of the defendant as prays a decree for damages on behalf of the defendant for causes alleged in excess of the amount of the demand of the complainants to the cross-bill of defendants, and demurrer of defendant to the cross-bill of the complainants, and was argued by counsel. On consideration whereof, the court being of opinion that the demurrer of the complainants to that part of the cross-bill above mentioned of the defendant is well taken, and that the demurrer of the defendant to the cross-bill of the complainants is not well taken, it was, thereupon, at said October term, ordered and adjudged by the court that the demurrer of the complainants to the said cross-bill of the defendant should be sustained, and that the demurrer of the defendant to the cross-bill of the complainants showed to be overruled; and thereupon, at said October term, the defendant, by his counsel, made known to the court his intention to move the court for leave to amend the answer of the defendant, but in consequence of the absence of defendant, that his counsel were not prepared to submit said motion at that time; whereupon the court, at the instance of the counsel for defendant, ordered that time be extended to defendant to present his said motion. But no entry having been made upon the minutes of the proceedings of the court in the premises within our said term of October, it is, on motion of the complainants, ordered by the court that this entry thereof be now
55 made, and that the same be taken for all purposes as made at our said October term. Also at a former day in our present term came the defendant by his counsel, and complainants by

their counsel, and defendant moved the court for leave to amend his said original answer and cross-bill and submitted to the court a draft of the proposed amendment, and his affidavit in support of his said motion, which motion was opposed by complainant; and at the same time complainants moved the court for a decree upon the merits according to prayer of the original bill of complaint, and in support of said motion offered in evidence to the court the original bills of exchange, and written contracts in said bill of complaint referred to, which motion was opposed on the behalf of defendant, and both of said motions were argued by counsel, and the decision thereof is now by the court taken under advisement, subject to be further argued if the court shall so direct, to be decided at our next April term.

Trial decree.

And afterwards, to wit, on the 18th day of January, A. D. 1865, it being the October term of said court for the year A. D. 1864, this cause having been continued from term to term to the said October term, A. D. 1864, in this cause came the parties, and the said defendant withdraws his motion, heretofore filed, for leave to amend his answer and cross-bill. And thereupon the cause came on further to be heard upon the pleadings and evidence, and was further argued by counsel; on consideration whereof the court is of the opinion that the equity of the case is with the complainants, and doth find
56 that there is due to the complainants from the said defendant, on account of the said three bills of exchange or drafts in the bill of complaint mentioned, the aggregate principal sum of six thousand seven hundred and eighty-one dollars and twenty cents, and the further aggregate sum of thirteen hundred and thirty-one dollars and seventy-six cents interest on said principal sum from the maturity of said bills of exchange to the 18th day of January, A. D. 1865, making together the aggregate sum of $8,112 96 of principal and interest. And the court doth order, adjudge, and decree that the said defendant do pay to the complainants the said sum of eight thousand one hundred and twelve dollars and ninety-six cents so found due as aforesaid, with interest thereon from the said 17th day of January, A. D. 1865, until the same shall be paid; also that the said complainants recover of the said defendant their costs by them herein expended, taxed at $; and in default of payment of said debt and costs, that the complainants have execution therefor against the said defendant as upon judgments at law. And the court doth further order that the defendant pay his costs herein, taxed at $, and in default of such payment that execution issue therefor as aforesaid.

Appeal.

Whereupon the defendant prays an appeal from this decree to the Supreme Court of the United States, and the same is allowed, upon his complying with the provisions of the statutes in such cases.

The written contracts offered by the complainants in evi-
57 dence in this cause are truly and correctly copied into and

set forth in the bill of complaint of complainants hereinbefore entered as part of this record, and are as follows, to wit:

"PITTSBURGH, COLUMBUS AND CINCINNATI RAILROAD LINE, (via, Steubenville,) *General Freight Agent's Office, No. 7, East Third street, opposite the Henrie House, Cincinnati, O., Aug.* 30, 1861.

"The Pittsburgh, Columbus, and Cincinnati and Central Ohio railroad lines propose to transport all the mules and horses that Messrs. Thomson & Groom, and such other parties as they may be interested with, may ship within the next forty days from Cincinnati, via Columbus and Steubenville or Bell-air, Pittsburgh and Harrisburgh, to Baltimore, at the rate of one hundred and twenty (120) dollars per car from Cincinnati to Baltimore, or one hundred and thirteen $\frac{60}{100}$ ($113\frac{60}{100}$) dollars per car from Cincinnati to Harrisburgh; Messrs. Thomson & Groom, and their associates, clerks and managers, to be passed free on business connected with their shipments between Cincinnati and Pittsburgh, and their hands to be passed free on stock trains with the stock, and returned free on passenger trains from Pittsburgh to Cincinnati; passes east of Pittsburgh to be issued in accordance with the custom of the Penn. R. R.; but it is agreed that I will endeavor to induce the Penn. R. R. to furnish the same passes herein agreed to be furnished west of Pittsburgh. Bedding for the stock to be furnished as customary with any of the western R. R. companies; horses to be shipped in covered cars, sufficiently ventilated. In the event of any damage occuring to the lines herein named west of Pittsburgh, by which transportation over them is sus-
58 pended, we agree to furnish transportation by other routes, on the same terms herein named. It is agreed that for the cost of transportation of said horses and mules, Wm. Stewart, agent P. C. an C. R. R. at Pittsburgh, is to be authorized to draw on Harrison Thomson, esq., at the Bank of the Metropolis, in Washington, D. C., at one day's sight, for each shipment separately as forwarded from Pittsburgh, said drafts to be paid promptly on exchange in New York.

"L. DEVINNEY,
"*Gen'l Agent, P. C. & C. & C. O. R. R. Cos.*"

This proposition is accepted and agreed to.

THOMSON & GROOM.

CINCINNATI, O., *Aug.* 30, 1861.

In pursuance of a contract for the transportation of horses and mules made by Messrs. Thomson & Groom with L. Devinney, gen'l ag't, this day I hereby authorize Wm. Stewart, ag't. P. C. and C. R. R. at Pittsburgh, to draw on me at the Bank of the Metropolis, Washington, D. C. at one day's sight, payable on exchange in New York, for the cost of transportation of each shipment of said Thomson & Groom through from Cincinnati to Baltimore or Harrisburg, as such shipments are forwarded from Pittsburg.

HARRISON THOMSON.

And the said bills of exchange or drafts introduced in evidence by the said complainants are in the words and figures following, to wit:

No. 8. $2,953 60.

PITTSBURG, *Pennsylvania, October* 1, 1861.

One day after sight, pay to the order of D. Robinson, cas., twenty-nine hundred and fifty-three $\frac{60}{100}$ dollars in New York exchange, value received, and place to account of Wm. Stewart, ag't.

To Harrison Thomson, esq., Bank of Metropolis, Washington, D. C.

Harrison Thomson, *Oct.* 4, 1861.

59 No. 9. $2,158 40.

PITTSBURG, *Pennsylvania, October* 4, 1861.

One day after sight, pay to the order of D. Robinson, cas., twenty-one hundred and fifty-eight $\frac{40}{100}$ dollars in N. Y. exchange, value received, and place to account of Wm. Stewart, ag't.

To Harrison Thomson, esq., at Bank of Metropolis, Washington, D. C.

Harrison Thomson, *Oct.* 7, 1861.

No. 10. $1,669 20.

PITTSBURG, *Pennsylvania, October* 8, 1861.

One day after sight, pay to the order of D. Robinson, cas., sixteen hundred and sixty-nine $\frac{20}{100}$ dollars in N. Y. exchange, value received, and place to account of Wm. Stewart, ag't.

To Harrison Thomson, esq., at Bank of Metropolis, Washington, D. C.

And afterwards, to wit, on the 28th of January, A. D. 1865, came the said defendant and filed in the office of the clerk of the court aforesaid his bond for appeal in the premises in the words and figures following, to wit:

Bond.

Know all men by these presents, that Harrison Thomson and John D. Hinde are held and firmly bound unto the Central Ohio Railroad Company, and the Steubenville and Indiana Railroad Company, corporation, &c., in the penal sum of sixteen thousand two hundred and twenty-eight $\frac{34}{100}$ ($16,228 $\frac{34}{100}$) dollars, lawful money of the United States, to the payment whereof well and truly to be made, they, the said Thomson & Hinde, do hereby bind themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with with our seals, and dated this 27th day of January, in the year of our Lord one thousand eight hundred and sixty-five.

60 The condition of this obligation is such, that whereas the said the Central Ohio Railroad Company and the Steubenville and Indiana Railroad Company did obtain a decree against the said Harrison Thomson in the circuit court of the United States for the seventh circuit and southern district of Ohio, at the term of October, 1864, thereof, to wit, on the 18th day of January, 1865, in case

No. 9 in said court, from which decree the said Thomson hath prayed an appeal to the Supreme Court of the United States: Now, therefore, if the said Thomson shall cause a transcript of the record and proceedings of the said circuit court to be transmitted to the U. S. Supreme Court within the time required by law, and prosecute the said appeal with effect, and also pay and satisfy to the said Central Ohio Railroad Company and the Steubenville and Indiana Railroad Company, or their successors or assigns, in case the said decree is affirmed, as well the amount of ($8,114 17) eight thousand one hundred and fourteen $\frac{17}{100}$ dollars, decreed to be owing from him to the said Central Ohio Railroad Company and Steubenville and Indiana Railroad Company by said circuit court, and all damages and costs accruing in said circuit court, as well as all damages and costs that may be awarded by the said Supreme Court against him, and faithfully abide by all orders of the said Supreme Court in that behalf, then and in such case this obligation to be void; otherwise, to be and remain in full force, virtue and effect. Done at Cincinnati the day and year above written.

HARRISON THOMSON. [SEAL.]
JOHN D. HINDE. [SEAL.]

61 In the presence of—the words, the Steubenville and Indiana Railroad Company, being interlined four times before signing—

THEO. KEMPER.

Signed, sealed, ackowledged and delivered by the said obligors as their voluntary act and deed for the purposes therein mentioned, before me, on the day and year above written, and the above bond is hereby approved.

JOHN McLEAN, *Clerk.*

UNITED STATES OF AMERICA, *Southern District of Ohio:*

I, John McLean, clerk of the circuit court of the United States within and for said district, hereby certify the foregoing transcript to be truly taken and copied from the records and papers of said court, as the same are kept and filed in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 21st day of September, A. D. 1865, and in the 90th year of the independence of the United States of America.

[SEAL.] Attest : JOHN McLEAN,
Clerk U. S. Cir. Ct.

SUPREME COURT OF THE UNITED STATES.

No. 183.

HARRISON THOMPSON
vs.
THE CENTRAL OHIO RAILROAD COMPANY AND the Steubenville and Indiana Railroad Company. } Appeal.

It is agreed by counsel on both sides that there are clerical errors in the certified copy of the record and in the printed copy; that the printed copy, corrected in accordance with clerk McLean's certificate hereto annexed, will present the record as it is in the original record made of the case in the court below. And we further agree that the certified copy, as originally certified to this court, and the printed copy, may be taken and treated in connection with the corrections herewith certified as the certified record for all the purposes of this case. The printed copy to be corrected acordingly.

H. H. HUNTER,
Att'y for Compl'ts.
AARON F. PERRY,
Att'y for Appellant.

March 25, 1867.

Also, the parties, by their counsel, agree that the case was heard in the circuit court as upon demurrer by the defendant to the cross-bill of the complainant, and that as to said cross-bill the case be heard and disposed of by the Supreme Court as if a demurrer thereto had been filed at the proper time.

AARON F. PERRY,
Att'y for Appellant.
H. H. HUNTER,
Att'y for Appellee.

"A."

2 U. S. circuit court, southern district of Ohio, in chancery.

THE CENTRAL OHIO RAILROAD COMPANY and the Steubenville and Indiana Railroad Company
versus
HARRISON THOMPSON.

"That drafts were not drawn on this defendant for said transportation at sight for each shipment separately, as forwarded from Pitts-

burgh, but were drawn irregularly for several shipments in lump; that defendant, besides the shipments hereinbefore mentioned and those mentioned in complainant's bill, shipped other horses and mules under said contract, and did not nor does now deny his obligation to pay for said transportation, and did accordingly accept and pay many bills, to an aggregate amount of $; but defendant has and does claim to recoup and recover the amount of his expense and damages hereinbefore described and set forth, to wit: the sum of twenty-four thousand three hundred and ninety-three dollars and fifty cents, ($24,393 50.)

"The defendant prays that this answer may be taken as a cross-bill against said 'the Central Ohio Railroad Company' and said 'Steubenville and Indiana Railroad Company;' that subpœna may issue against them respectively, and that at the final hearing hereof
3 the defendant may be decreed to recoup and recover of said railroad companies said amount of twenty-four thousand three hundred and ninety-three dollars and fifty cents; that complainant may be decreed to deliver into court to be cancelled the three bills described in the petition as drawn on the defendant, and that the complainant may be decreed to refund and pay to defendant the balance of his said damage and expense, to wit: the sum of $17,612, or so much thereof as shall be found equitable, and that defendant recover of complainants his costs, and for other relief.

"AARON F. PERRY,
"*Attorney for Defendant.*"

SOUTHHEN DISTRICT OF OHIO, *Hamilton County, ss:*

Personally appeared the above-named Harrison Thompson, and being sworn makes oath and says, that the several matters and statements in the foregoing answer and cross-bill, so far as stated from his personal knowledge, are true; and that all the several other matters and things therein stated are true, according to the best of his knowledge, information, and belief.

HARRISON THOMPSON.

Subscribed in my presence and sworn to before me, this 29th day of August, 1863.

[SEAL.] M. F. WILSON,
Notary Public.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, John McLean, clerk of the circuit court of the United States in and for the district aforesaid, certify that the paper appearing in printed record, headed "amendment," beginning at page 21 of printed record and ending at page 23 of same, is not a part of the original record, but appears in the record certified to the Supreme Court by clerical error; and that the jurat appended to said amendment, as it appears in said printed copy; properly belongs to and is

a part of the answer and cross-bill; and that there appears in said original record the passage herewith certified and marked "A," beginning page 21 of printed record at the point where the word "amendment" now appears and completing the answer and cross-bill of defendant below in lieu of the paper entitled "amendment," which was substituted therefor by clerical error.

Witness my hand and the seal of said court, this 7th day of March, A. D. 1867, and in the 91st year of American independence.

Attest:

[SEAL.] JOHN McLEAN, *Clerk.*

Filed 26th April, 1867.

Supreme Court of the United States.

DECEMBER TERM, 1867.

No. 44.

HARRISON THOMSON, APPELLANT,

vs.

THE RAILROAD COMPANIES.

SUMMARY OF THE CASE FOR THE APPELLANT, FILED BY CARLISLE AND McPHERSON, *of Counsel.*

1. The railroad companies, (appellees,) began the litigation by suing Thomson, (appellant,) in the proper State court in Ohio, from which court the cause was duly removed to the Federal court, on Thomson's application.

The case thus removed was an ordinary action at law upon certain acceptances made by the then defendant Thomson, and for certain matters properly chargeable in account.

Arrived in the Federal court, the first thing the plaintiff did was to move the court for leave to file a bill in equity in lieu of his petition, in the nature of a declaration at law, filed under the Ohio code, which was allowed, (Rec. p. 6,) and the court directed the clerk "to correct the entry on the appearance docket, so that it be entered as a cause in chancery." Thereupon the complainant filed a bill in equity against the defendant Thompson, claiming the amount of the acceptances originally sued on, and setting out at length a certain contract as the foundation and consideration thereof, which contract appears in the record as follows:

"PITTSBURG, COLUMBUS, AND CINCINNATI RAILROAD LINE, (VIA STEUBENVILLE,) GENERAL FREIGHT-AGENT'S OFFICE, No. 7 EAST THIRD STREET, OPPOSITE THE HENRIE HOUSE, CINCINNATI, O., *August* 30, 1861.

"The Pittsburg, Columbus, and Cincinnati and Central Ohio railroad lines propose to transport all the mules and horses that Messrs. *Thomson & Groom*, and such other parties as they may be interested with, *may ship*, within the next forty days, from Cincinnati, via Columbus and Steubenville, or Bellair, Pittsburg, and Harrisburg, to Baltimore, at the rate of one hundred and twenty (120) dollars per car from Cincinnati to Baltimore, or one hundred and thirteen and sixty one-hundredths ($113\frac{60}{100}$) dollars per car from Cincinnati to Harrisburg, Messrs. Thomson & Groom, and their associates, clerks, and managers, to be passed free, on business connected with their shipments, between Cincinnati and Pittsburg, and their hands to be passed free on stock-trains with the stock, and returned free on passenger-trains, from Pittsburg to Cincinnati; passes east of Pittsburg to be issued in accordance with the custom of the Penn. R. R.; but it is agreed that I will endeavor to induce the Penn. R. R. to furnish the same passes herein agreed to be furnished west of Pittsburg. Bedding for the stock to be furnished as customary with any of the western R. R. companies. Horses to be shipped in covered cars, sufficiently ventilated. In the event of any damage occurring to the lines herein named west of Pittsburg, by which transportation over them is suspended, we agree to furnish transportation by other routes on the same terms herein named. It is agreed that, for the cost of transportation of said horses and mules, Wm. Stewart, agent P. C. and C. R. R. at Pittsburg, is to be authorized to draw on Harrison Thomson, Esq., at the Bank of the Metropolis, in Washington, D. C., at one day's sight, for each shipment separately, as forwarded from Pittsburg, said drafts to be paid promptly on exchange in New York.

"L. DEVINNEY,

"*Gen'l Agent, P. C. & C. & C. O. R. R. Cos.*"

This proposition is accepted and agreed to.

THOMSON & GROOM.

CINCINNATI, O., *Aug.* 30, 1861.

In pursuance of a contract for the transportation of horses and mules, made by Messrs. Thomson & Groom with L. Devinney, general agent, this day I hereby authorize Wm. Stewart, Agent P. C. and C R. R. at Pittsburg, to draw on me at the Bank of the Metropolis, Washington, D. C., at one day's sight, payable on exchange in New York, for the cost of transportation of each shipment of said Thomson & Groom through from Cincinnati to Baltimore or Harrisburg, as such shipments are forwarded from Pittsburg.

HARRISON THOMSON.

Which contract is introduced into the bill by apt averments to charge the defendant Thomson solely in the premises. Thus it is averred that the proposition was "*delivered * * to the defendant,*" and that *the defendant * * * accepted the same by subscribing to said acceptance the name Thomson & Groom,*" and that the authority given to Stewart to draw was given by the defendant, * * * his own *proper signature being thereto attached.*" (Rec., p. 8.)

The bill then proceeds to show what was done between the complainants and defendant under the contract, omitting all reference to any other persons, as follows:

"*That the said defendant, availing himself of his contract and agreement aforesaid, within the time limited thereby, caused to be delivered on board the cars at Cincinnati, aforesaid, * * a larye number of mules, to be transported under and in pursuance of said contracts, and that the same men received and transported in conformity with the said contract, and in fulfillment of the terms thereof;*" and that the drafts were drawn and accepted in conformity with the agreement. (Rec., p. 8, 9.)

In fact the complainants knew no other person than Thomson in the transaction, as plainly appears in a subsequent stage of the proceedings, when, by a cross bill (Rec., p. 25,) for discovery, they declared that they are ignorant of the Christian name or residence of Groom, and of what person or persons were associated with Thompson, and pray that he may be compelled to disclose their names and residences.

The defendant, by his answer, admits his contract, as alleged, and that the drafts were drawn and founded upon an alleged fulfillment thereof *pro tanto*, and proceeds then to set up and charge non-fulfillment, negligence, and misfeasance by the complainants in the very matter of the said contract, which are all specifically set forth and detailed in the answer, and are averred to have caused to the defendant, in the matter of the said contract, a direct damage amounting to $24,393 50, and he prayed that his answer might be taken as a cross-bill for relief, and that he should have a decree for the whole sum of $24,393 50; that complainants be decreed to deliver into court, to be cancelled, the bills described in the petition, and to pay to the defendant the balance of his said damage, viz: $17,612 30, or so much thereof as should be found equitable.

To this cross-bill, being *the whole matter of Thomson's defence*, the now appellees answered, setting up, in effect, that the damage and injury complained of appeared by the cross bill to be in respect of the transportation of horses and mules, not alleged to have been the property of Thomson & Groom, or of Thomson & Groom and their associates, but the sole property of Thomson himself, (Rec., p. 24;) thus attempting to exclude the whole matter of Thomson's defence, upon the ground that their liability was to him, in common with others, while he individually remained liable to them under the same contract. And they further specially demurred to so much of the cross-bill as sought to recover against them the balance of damages and expenses, viz, $17,612 30. (Rec., p. 28.) This being the substance of the matter in controversy, we omit reference to collateral matters referred to in the briefs on both sides, heretofore filed.

The court sustained the view of the law taken by the appellees in their answer and demurrer to the cross-bill, and decreed in favor of the appellees for the whole sum claimed by them. This appeal is to reverse that decree.

I.

It is not perceived how a court of equity had jurisdiction to make any decree upon the case made by the complainants' bill.

Whether their course of action was upon the contract, or upon the acceptances, or upon both together, their remedy at law was adequate and complete. Upon its face the contract was an ordinary carriers' contract, with a stipulation for payment in a certain mode.

The case does not present a single element for equitable jurisdiction and relief. Thomson had actually accepted two of the drafts, and had agreed to accept all others similarly drawn in pursuance of the contract, and the complainants pretended no other cause of action than that upon the contract and drafts. And the equitable jurisdiction is not pretended to be maintained except upon these grounds, viz: that by the drafts the legal title to the debt was in D. Robinson, the payee, and that the appellees were the equitable owners only. That as such they were compelled to sue in their own names in the State court, and having so sued, when they were removed into the Federal court, they were compelled to continue plaintiffs upon the record, and that they could only so continue by transmuting the case from an action at law into a suit in equity.

But it is submitted that the jurisdiction of a federal court is not to be determined by any such consideration. It may, perhaps, be doubted, whether, having been brought into the Federal court by the defendant, he could not there have maintained his action at law, he having instituted it in his own name, in compliance with the State law. But surely it cannot seriously be maintained that a Federal court of equity can entertain a purely legal action upon the mere ground that if it should not confound the distinction between legal and equitable jurisdiction, the plaintiff would be put to the inconvenience of suing out a new writ. No authority has been cited for any such notion; nor do we know of any. But no such dilemma arose. It seems clear that the plaintiffs might have continued their suit in their own name, or have sued originally in their own name in any common law court, independently of the Ohio statute, notwithstanding the form of the acceptancy. They themselves allege that the drafts were so drawn merely for the purpose of collection, the payee having no beneficial interest in them. (Rec. pp. 9, 10, 11.) He was therefore their agent only.

The instruments remained in the possession of the complainants, and were never negotiated.

If this point as to the jurisdiction is well taken, the decree must be reversed, and the bill dismissed.

II.

But if the court of equity had jurisdiction, it could only give relief to the complainant upon the principles of equity, unrestrained, by any purely legal and technical objections, from decreeing according to the real merits of the transaction.

The matter set up by Thomson, in his defence, was the failure of the complainants to perform, on their part, the very contract upon which their right to recover depended. In setting up the case on their part, they themselves necessarily set out the contract, and averred a fulfillment on their part. The defence traversed this allegation, and set up a cross-demand, growing out of the failure of the complainants; and this defence was wholly rejected, simply because it was set up by Thomson, the sole defendant, in his own name—the only mode in which it could be set up at all, so long as he remained the sole defendant, as they had chosen to make him.

As we have seen, the transaction was with Thompson alone. All the horses and mules were delivered by Thomson, to be transported under the contract, and were so accepted and transported by the complainants. With the contract before them, referring to Thomson and his associates, they sued Thomson alone; and it is only when their liability under the same contract is set up in defence, that they seek to establish this conclusion, viz: That whereas the contract is with Thomson only, for all purposes of recovery, it is with Thomson *and others*, as to their own liability upon it, and that therefore it is impossible for Thomson, in such suit, to avail himself of the failure on their part.

This conclusion seems to us against reason and conscience, and wholly inadmissible in a court of equity.

With this general outline, we beg leave to refer to the brief of our colleague, Mr. Perry, already filed, for authorities and details.

Supreme Court of the United States.

HARRISON THOMPSON, Appellant,

vs.

THE CENTRAL OHIO RAILROAD COMPANY, and
THE STEUBENVILLE & INDIANA RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

ARGUMENT FOR COMPLAINANTS,

BY H. H. HUNTER.

Nevins & Myers, Printers, Columbus, O.

Supreme Court of the United States.

HARRISON THOMPSON, Appellant,
vs.
THE CENTRAL OHIO RAILROAD CO., and
THE STEUBENVILLE & INDIANA RAILROAD CO.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

ARGUMENT FOR COMPLAINANTS,

BY H. H. HUNTER.

The first question in order arising in the case is, whether the complainants, upon the allegations of their bill of complaint, filed in the Circuit Court, and otherwise appearing in the record, were entitled to proceed in that court by bill in equity?

The facts on which this question depends, briefly stated, are, in substance, as follows: On the 30th day of August, 1861, a written contract was entered into between the complainants, by their agent, L. Devinney, of one part, and *Thomson & Groom*, of the other part. In form, the contract consisted of a written proposition on the part of the complainants by their said agent, "to transport all the mules and horses that *Thomson & Groom*, and such other parties as they might be interested with, should ship within the next forty days from Cincinnati *via* Columbus and Steubenville, or Bellaire, Pittsburgh, and Harrisburgh, to Baltimore, at the

rate of $120 per car from Cincinnati to Baltimore, or $113.60 per car, from Cincinnati to Harrisburgh."

[Other terms are also included in the proposition, not material to be recited for present purposes, to be seen by reference to the copy at large in the record.]

The proposition was signed by "L. DEVINNEY, *General Agent*," &c., for the complainants, and was submitted to the Appellant, *Harrison Thomson*, who signed, at the foot of it, the following acceptance and agreement.

"This proposition is accepted and agreed to.

"THOMSON & GROOM."

At the same time, and as a part of the same transaction, the Appellant executed, under his own individual signature, his separate, individual, written instrument or warrant, and delivered the same to the said agent of the complainants, copied as follows:

"CINCINNATI, O., Aug. 30, 1861.

"In pursuance of a contract for the transportation of horses and mules, made by Messrs. *Thomson & Groom* with L. Devinney, Gen'l Agent, this day, I hereby authorize Wm. Stewart, Agent P. C. and C. R. R., at Pittsburgh, to draw on me, at the bank of the Metropolis, Washington, D. C., at one day's sight, payable in exchange on New York, for the cost of transportation of *each* shipment of said *Thomson & Groom*, through from Cincinnati to Baltimore or Harrisburgh, as such shipments are forwarded from Pittsburgh.

(Signed) "HARRISON THOMSON."

Within said period of forty days, sundry car loads of mules, as averred in the bill of complaint, were placed on board cars by the Appellant, and were transported by the complainants through, from Cincinnati; and as they were shipped or forwarded from Pittsburgh, said William Stewart, pursuant to the power given, as aforesaid, drew three drafts on the Appellant for the amounts of the transportation due on said shipments; which drafts, by direction of the complainants, and for convenience of collection, merely, were drawn paya-

ble to the order of D. Robinson, Cashier, he having no interest in their proceeds. Said drafts are copied as follows: (Record, page 32.)

Harrison Thomson, October 4, 1861.

No. 8. PITTSBURG, PENNSYLVANIA, October 1, 1861.

$2,953.66. One day after sight, pay to the order of D. Robinson, Cas'h, Twenty-nine hundred and fifty-three 60-100 dollars in New York exchange, value received, and place to account of

WM. STEWART, Ag't.

To HARRISON THOMSON, Esq.,
Bank of Metropolis, Washington, D. C.

Harrison Thomson, October 7, 1861.

No. 9. PITTSBURG, PENNSYLVANIA, October 4, 1861.

$2,158.40. One day after sight, pay to the order of D. Robinson, Cash'r, Twenty-one hundred and fifty-eight 40-100 dollars in New York exchange, value received, and place to account of

WM. STEWART, Ag't.

To HARRISON THOMSON, Esq.,
Bank of Metropolis, Washington, D. C.

No. 10. PITTSBURG, PENNSYLVANIA, October 8, 1861.

$1,669.20. One day after sight, pay to the order of D. Robinson, Cash'r, Sixteen hundred and sixty-nine 20-100 dollars in New York exchange, value received, and place to account of

WM. STEWART, Ag't.

To HARRISON THOMSON, Esq.,
at Bank of Metropolis, Washington, D. C.

The first two of said drafts were duly accepted by the Appellant, but were protested for non-payment; the third was protested for non-acceptance; and all of them being unpaid and not endorsed by the payee, were returned, under protest, to the complainants.

On the 20th day of April, 1862, the complainants instituted a civil action in the Court of Common Pleas of Muskingum county, in the State of Ohio, in their joint corporate names, as plaintiffs, against the Appellant, *Harrison Thomson*, as defendant, for the recovery of the amounts due on said drafts, and an additional sum of $432, claimed to be due to them for

an additional shipment of mules not included in the drafts. [See copy of petition, page 2, of printed record.]

The defendant in said action, [Appellant,] having filed his petition, and given bond according to the act of Congress, caused said action, and the record and proceedings had therein, to be removed into the Circuit Court of the United States for the Southern District of Ohio; in which court the proceedings were had in said cause set forth in the record, resulting in a decree in favor of the complainants, for the amount, principal and interest, due on said three drafts, from which decree the case is brought to this court by appeal by the defendant below.

The proceeding in the Court of Common Pleas was, in form, a *civil action*, under the code of civil procedure of Ohio, which provides (§ 25) that every action must be prosecuted "*in the name of the real party in interest*," &c.; and (§ 3) "that the distinction between actions at law and suits in equity, and the *forms* of all such actions and suits heretofore existing are *abolished;* and in their place there shall be, hereafter, *but one form of action, which shall be called a civil action.*"

On the removal of the case into the Circuit Court, this *form* of proceeding being unknown in practice in that court, the complainants were necessitated to substitute, in place of their code petition, some other form known to the practice of the Federal Courts, for the statement of their cause of action or complaint, either a *declaration* at common law, or a bill in equity, according to the nature of their claim; and on their motion, leave was given to them (Record, page 6) to file in the case a bill in chancery, in substitution of their original petition; and the bill of complaint set forth in the record (pp. 6 to 12) was filed, and stands as the basis of the subsequent proceedings; the demand for $432, not being asserted in the bill.

On this state of case, without reference to anything else appearing in the record, arises the question already suggested: Were the complainants entitled to proceed by bill in equity in the Circuit Court? And we may add, had they, in that court, a plain and adequate remedy *at law?*

These questions have to be answered in view of the fact that the case was rightfully commenced in the State court, and from a legal necessity, in the names of the complainants as plaintiffs. It will not be questioned but that they were the *real parties interested* in the drafts, and that they were *exclusively* interested in them. Being thus, necessarily, the plaintiffs in the case in the State Court, they also, from legal necessity, remained plaintiffs in the Circuit Court after the removal of the case.

It is incontrovertible that the legal title of the drafts was in the payee, D. Robinson, and equally certain that the complainants were the equitable owners of them. Hence no action *at law* could be sustained on them in the names of the complainants, but only in the name of D. Robinson; and the ground assumed on the part of the Appellant is, that the complainants, being the equitable owners, had the right to sue, at law, in the name of D. Robinson. But, however that may be according to the practice of some courts of law (and no one can say that the rule is uniform in all courts), the answer to it is, that by the Ohio code it is expressly forbidden, as already stated.

But the learned counsel for the Appellant, in his opening argument, asserts that the bill of complaint is not founded upon the *drafts* as the cause of action on which the relief is prayed, but on the *contract*, pursuant to which the drafts were given. Assuming that to be so, the learned counsel proceeds to argue that the cause of action arising in behalf of the complainants for a breach of that contract, is at law, and not in equity—that there is a clear and adequate remedy at law for the supposed breach; and therefore that it was error, for which the decree must be reversed on this appeal, to decree relief in behalf of the complainants.

It is only necessary to examine the bill of complaint with as much care as may be required to understand its true scope and object, to be convinced of the fallacy of this objection. The special prayer for relief is, that the defendant be adjudged and decreed to pay to the complainants "the said several

sums of money *in said several drafts specified;*" and the sole causes of action alleged against the defendants, are the *drafts;* all else is mere inducement, the legitimate use of which is to show the origin and consideration of the drafts, and this for the purpose of showing the equitable right and ownership of them by the complainants. Perhaps that is set forth more circumstantially than was necessary; but if so, the case is not thereby changed in its legal bearing, the substance of which, in outline, is simply this: That a contract was entered into between the complainants and *Thomson & Groom*, by which the complainants agreed to transport horses and mules for *Thomson & Groom*, at stipulated rates per car load, to be paid for by the defendant, the Appellant, as the shipments were made *from* Pittsburgh, by drafts to be drawn *by his agent on him*, at one day's sight, at Washington, payable in exchange on New York; that shipments were made and drafts drawn for the proper amounts of the transportation, to the order of D. Robinson, Cashier, for convenience of collection, for the use and benefit of the complainants; two of which were accepted by the defendant, and protested for non-payment, and one for non-acceptance; of all of which drafts (none of which were indorsed by the payee) the complainants were the holders, and as such entitled to demand and receive payment thereof.

We may be excused for saying that it is difficult to suppose that, upon such simple elements, able and learned counsel can themselves be deceived, or misled in their understanding of the true *gravamen* of the case made by the bill; or that they can expect that the court will so far fail to properly understand it, as to be misled to act upon it in a false light. We shall not attempt to follow up the line of argument presented by the learned counsel to effect this object, or to refute it in detail. Nor need we assume, as the learned counsel evidently supposes we will be obliged to do, that the contract liability of the Appellant was merged in the drafts. For the purposes of the case we care not how that may be. It is enough for us to know, that the drafts, *per se*, import a legal

liability, for the non-payment of which the payee could sustain an action at law against the Appellant. Of this there is no room for doubt, as to the two acceptable drafts; and it is equally certain as to the one protested for non-acceptance, because it was drawn by his procuration, by his duly authorized agent, upon himself. Its legal effect is precisely the same as if it had been drawn by himself, over his own signature, and addressed to himself as drawee—in which case the effect would simply be that of his promissory note; and the payee would be entitled to recover at law upon it, the legal title being in him; and for all the same reasons, the complainants being, in equity, the owners, have good right to sustain their bill in equity to recover the money due on the drafts. But to show their equity, it became necessary to allege in their bill, the special circumstances under which the drafts came into existence. The doing of that has, it seems, inspired the hope on the part of the learned counsel, that the court can be made to believe that the *drafts* are not the gravamen of the bill of complaint, but the *contract*, in pursuance of which they were given. And upon the assumption that this proposition will be sustained by the court, a point is made for reversing the decree and dismissing the bill.

Another assumption relied upon in argument by the learned counsel is, that the drafts set forth in the Bill of complaint are other and different from those set forth in the original petition in the State court. The foundation for this seems to be, that in the petition it was alleged that the *complainants* were the drawers, and in the bill, that the *defendant* was the drawer. It is only necessary to compare the original petition (pages 2 and 3 of the record) with the bill (pages 6 to 12), to see that the drafts described in each are identical; and if, in the particular referred to, there may have been an inaccuracy of description, it was of such kind as admitted of being amended, and *that*, in the draft of the Bill, was effectually done.

But what of all this, at the present stage of progress in the case? It is, we submit, quite too late, after the defend-

ant has answered to the merits of the case, as made upon the bill of complaint, and suffered the case to proceed to a final decree in the Circuit Court, to spring either of the questions above referred to, for the first time in this court. We suppose, that if the bill of complaint had been filed originally in the Circuit Court, and the defendant, without process, and without a case certified from a State Court, had entered his appearance to it, or answered to its merits, and proceeded to a hearing and final decree, it would be quite too late for him to except to the jurisdiction of the court for any purpose—the subject-matter being such as of which the court had jurisdiction. Not only has the Appellant answered to the merits of this bill, but his answer asserts a claim for affirmative relief on his part; and one part of his claim here, for a reversal of the decree, is, that the court below erred in not sustaining his cross-bill. He thus still invokes the jurisdiction for affirmative relief.

Analogous to this, in principle, is another point urged by the counsel—namely, that the bill of complaint was filed on leave granted by the court, without notice to the defendant of the motion for such leave.

The motion (page 6 of record) was made in open court, at a regular term, and leave given to the plaintiffs to file their bill in chancery, "*in substitution of their petition originally filed in the State court, alleging the same causes of complaint;*" and the defendant was ruled to answer said bill, by the same rule day that he would be required to answer the same, if said bill of complaint had been filed as an original suit in the Circuit Court. The bill was filed on the same day on which the rule was entered, January 20, 1863.

On the 6th day of April, 1863 (page 12 of record), the defendant moved the court to continue the cause to the next regular term, and for leave to plead, answer, or demur. On the same day (page 13), the default for answer was set aside, leave given to answer in 90 days, and cause continued.

On the 29th day of August, 1863, the defendant filed his answer and cross-bill, caused process to be issued upon it,

and to be served on the complainants (pages 13 to 23); and entered a rule on the complainants, as defendants to his cross-bill, for answer. All this without any objection for want of regularity, on the part of the complainants, in not serving him with notice of their motion for leave to substitute their bill of complaint in place of their original petition, in the State Court. Now if, after these steps were taken, and before any thing further was done in the cause, the defendant had interposed the objection in question, on what principle of reason or justice could it have been allowed by the court? Is it necessary to argue such a proposition to this court, or to cite authorities for its enlightenment upon it?

But the defendant did not even then interpose, but persisted in his efforts to litigate with the complainants, touching the merits of their cause of complaint set forth by their bill, and in asserting his own grievances against them, and demanding relief on the footing of his cross-bill, without a word of suggestion about any irregularity for want of notice, till the case was carried to final decree; and now, for the first time, on the appeal to this court, it is brought forward as a ground for reversing the decree. We feel a reluctance to seem to think it necessary to ply the court with references to authorities on these points. We may, however, be excused for referring to the case of *Ferrar* v. *The United States*, 3 Peters, 459; *Parker* v. *Williams*, 4 Paige, 439; *Hume* v. *Babington*, 1 Hogan, 8; 1 Daniels' Ch. Pr. 592–3; and especially *Marine Bank* v. *Fulton Bank*, 2 Wallace, 258.

In addition to what is said above respecting the point raised in behalf of the Appellant, that an adequate remedy could be had by the complainants, by an action at law in the name of D. Robinson, for their use, on the drafts, we desire to say that if, under the circumstances, it had been possible, after the case came into the Circuit Court, for the complainants to have proceeded in the name of Robinson, in the form of an action at law, it cannot be denied that, although the complainants were the sole parties really interested in the drafts, they had the right, *prima facie*, in virtue of their

equitable right, to proceed in equity; and having done so, and no exception being taken by the defendant to that form of procedure till it was matured into a decree, his objection, now taken for the first time, comes too late. Having answered over to the merits, he has waived the technical objection and is estopped to assert it.

But we do not concede that the complainants either had, under the circumstances, adequate remedy at law in the name of Robinson; or were, by law, restricted to proceed in that form, if they could have done so. We do not, however, deem it necessary to enter at large upon the argument of the general proposition, believing that, in *this* case at least, commenced as it was in the State Court, it should be taken out of the operation of the general rule, if that rule would otherwise have compelled the complainants to have proceeded in the name of Robinson, and had the action originally been brought in the Circuit Court. We shall content ourselves with a mere citation of authorities—most of which will also be found referred to in the opening argument of opposing counsel—and with the general remark that, to say the least, the complainants had a clear *concurrent* remedy and right to proceed in equity.

Story's Eq. Pl. § 154 (4th Edition) and notes, referring to *Field* v. *Maghee*, 5 Paige's R. 539; *Rogers* v. *The Traders' Ins. Co.*, 6 Paige, 583, 589; *The President, &c., of the Bank of the U. S.* v. *Weiseger*, 2 P. R. 331; *Mandeville* v. *Jemison & Redale*, 1 Cranch, 290; 5 Do. 322; *Townsend* v. *Carpenter* 11 O. R. 21; 3 leading cases in Equity (Hare & Wallace's Notes) Am. Ed.—cases, *Row* v. *Dawson*, and *Royal* v. *Rowles*, and notes, 612 margin, 280 top, &c. *

It will be seen, we think, that in all the cases cited by opposing counsel, the objection to the exercise of equitable jurisdiction was taken *in limine*, by demurrer; and in several of them, perhaps generally, the principle is clearly admitted that the rule does not apply, in cases in which it would, in view of particular facts, produce inequitable results. See the

* Gaines et al. v. Relf et al. 15 P. 9; Livingston v. Story 9 P. 656.

synopsis of the following cases in the opening argument of opposing counsel, pages 13 to 19:

The Ontario Bank v. *Mumford*, 2 Bar. Ch. R. 615;
Carter v. *United Ins. Co.*, 1 J. C. R. 463;
Moseley v. *Bush*, 4 Randolph (Va.) 392;
Farmer v. *Bascomb*, 9 B. Monroe, 23;
Smiley v. *Bell*, Mart. & Yerg., 378;
Haynes v. *Thompson*, 34 Miss. (5 George) 17.

In anticipation of the objection which we make to the application of the rule relied upon by opposing counsel, arising out of the fact that the suit originated in the State Court, they argue (page 7) that when an action is removed from a State Court, and the parties required at Common Law were different from those to the action in the State Court, the Federal Court may allow *new* parties to be made.

We have examined the several cases cited by the counsel as sustaining this proposition, except that of *Suydam et al.* v. *Ewing*, 2 Blatchford, 359, but do not find *any such question presented in either* of them.

The same cases are cited as sustaining another principle laid down by counsel, viz: that "the difference between the requirements of the Common Law and of the Code, as to the parties to an action, can not change the jurisdiction from law to equity, and take away the right of trial by jury."

We do not question the soundness of this proposition, nor do we run counter to it in any particular, claimed by us in this case. We do not claim to "*change the jurisdiction from Law to Equity*," or in any way to "*take away the right of trial by jury.*"

What we claim in this regard is, that according to well established principles of Equity jurisprudence, the complainants have a remedy, *in Equity*, for the causes complained of in their bill; and as to the right of trial by jury, it remains precisely where it always has been, under the discretion of the Chancellor in determining issues of fact.

A further proposition is laid down by the learned counsel (page 7) the soundness of which we controvert as applicable

to the present case, properly understood: "Actions commenced under the Code in the State Court, and removed to the Federal Court, will be proceeded in as if commenced in the Federal Court, and will be actions at law, or in equity, according to the nature of the same, determined by the tests which distinguish law from Equity jurisdiction."

It is certainly true that the nature of causes of action has not been changed by the Ohio Code. *Legal* rights, as recognized before the Code, remain *legal* rights as contradistinguished from *equitable;* and so, *e converso*, of *equitable* rights —that is to say, their nature and the principles of law by which they are governed remain the same; but the forms of proceeding for adjudicating the rights of parties in them under the Code, are wholly changed—the old forms "abolished." Law and Equity, *in their forms*, no longer exist. *Legal* title, if vested in a person different from the person vested with the equitable title, is lost sight of. The right of action is exclusively vested in the *equitable* owner, and he alone can sue, except in special cases. Such equitable owner prosecutes an action under this requirement, in the State Court. The defendant removes the case, under some of the numerous acts of Congress now in force so authorizing it to be done. At common law, a plain and adequate remedy might have been had in the name of some one in whom was vested the legal title of the subject matter. But *he* is no party to the record —now what is to be done? The theory of the learned counsel is, that the Federal Court, by some heretofore unknown process, must get a new plaintiff in the case, and of course get clear of the old or existing plaintiff. They say "*it will be proceeded in* as if commenced in that court, and will be an action at law, or in equity, according to the nature of the subject matter"—meaning that if it be a *legal* right, the action *must* be at law, and in the name of the holder of the legal title. This we say is unsound in a case like this, in which the action is brought by the holder of the equity; that being so, he has a right to invoke the aid of a court of equity, on general principles, and in that sense we agree

with the counsel, that the case will be proceeded in "as if commenced *in equity*, in the Federal Court, according to the nature of the plaintiff's rights in the subject matter." If this rule be applied in such cases, no violence will be done to known legal principles; but the contrary rule, of making new parties, would be incongruous, and nobody is wise enough to foresee what embarrassments would grow out of it. But what solid objection can be urged against a proceeding in equity? The greatest interests known to the business world are administered, and rights settled, through the instrumentality of the Chancellor; and in a practical sense, all that can be said about the great privilege of a jury trial, in civil causes, beyond what, in proper cases, may be had in a proceeding in equity, is, in the estimation of most men of experience, rather more fanciful than sound. As a constitutional right, it is to be guarded and secured in all cases where it properly belongs; but it were a mere abuse of that right to extend it to cases such as the present, the effect of which would be to sacrifice the solid rights of one party to the empty pretences of another about the loss of the right of trial by jury.

The claim asserted by the complainants, for reasons already stated, is such as precludes *them* from pursuing it in an action at law. *They* might, therefore, say that *they* are deprived of the right of trial by jury. If it be a misfortune to have a cause of action, the remedy for which is in equity, they must needs forego the benefits of a jury trial, unless an issue of fact is raised, proper in the opinion of the Chancellor to be tried by a jury; and for all the same reasons, the like consequences result to the defendant. But these are the consequences of law, and complaints are vain. In this case, however, every material fact alleged by the complainants is fully admitted by the answer of the defendant.

Thus far, therefore, all that is said about the right to a trial by a jury is mere pretension, if intended to be applied to this part of the subject; and as to anything else it will be seen as we progress, that there is nothing that could be

worked into an issue for a jury, not even an issue to be ordered by the Chancellor.

The cases of *Baker* v. *Biddle*, 1 Baldwin, 416, and *Parker* v. *W. L. C. & W. Co.*, 2 Black, 550, are cited by counsel (page 8,) connected with the remark that, "In the Federal Courts, an objection to the jurisdiction *for want of equity* in a bill has never been overruled for want of a demurrer or plea." The meaning of this as intended to be applied to the present case, we understand to be, that if the case set forth in a bill in chancery as the ground for equitable relief, is plainly a case for which the complainant may have adequate remedy by action at law, in his own name as plaintiff, the bill may be dismissed by the court *sua sponte*, though not demurred to. In the case last above cited, it is said by the court that: "In the courts of the United States it is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel." But the learned judge who delivered the opinion, was also careful to say, in the same connection after referring to the provisions of the act of Congress on the subject, that: "This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law is not *plain*, *adequate* and *complete*, or, in other words, where it is not *as practical* and *as efficient* to the *ends of justice*, and to its *prompt administration*, as the remedy in equity."

That was a bill to enjoin the defendants from infringing certain alleged rights of the complainant in an undivided interest in the use of a certain water power, in reference to which the court says: "He complains neither of a diminished supply of water, nor of back-water. We have looked carefully into the evidence upon the subject; the result is, that we are left in doubt upon which side lies the truth. We have failed to find those clear facts of right on one side, and wrong upon the other, which are necessary to quicken into activity the powers of a Court of Equity." "The Appellant does not state in his bill how the injury is produced, nor in what it consists."

Here was a case deficient, in two aspects of it, of the elements necessary to entitle the complainant to equitable relief: *First*, Upon the facts which were left in doubt, and therefore a case not made out upon the merits. *Second*, Upon the allegations of the bill, which failed to show even a *prima facie* case for relief. It was a case of private nuisance, in which the right of the plaintiff had not been established at law, nor was it alleged to be one of irreparable injury—and was such, in the opinion of the court, as, in which, if the complainant sustained any injury, which was left in doubt upon the facts, he had a clear and adequate remedy at law, and was not entitled to invoke the aid of a Court of Equity. A case widely different in every essential, from the present, and we need not repeat to show how this is. *

A further question is made by the counsel (pp. 8, 9, &c.,) to the effect that the drafts in question are not technical bills of exchange, because not payable in money, but in exchange on New York. Admitting that to be so, we do not appreciate in what point of view it operates favorably to the Appellant, or to the prejudice of the complainants, unless it may be in some way in connection with what is said in the next (the 9th) division of the brief, viz: that "the fact that *such* orders were drawn in favor of *D. Robinson, Cashier*, merely for the purpose of collection, and either never delivered to him, or delivered back by him to the plaintiffs, so that at the time the action is brought '*D. Robinson, Cashier*,' has neither possession nor beneficial interest in them, without more, does not show such an outstanding legal title in him as to authorize a suit in equity." "One must either have the beneficial interest in a bill or the possession, to constitute a *legal* title in him. The fact that his name is on it, does not give him the legal title." The meaning of all which, if we understand it, is, "that as the drafts were made payable to Robinson, for convenience of collection merely, he having no beneficial interest in them, he was not so vested with a legal title in them as to authorize an action at law to be prosecuted in his name upon them, and especially if they did not

* Robinson v Campbell 3 Wheat 212
Boyce's Exrs. v Grundy 3 Pets 210

remain in his possession, but were in the possession of the complainants, the real owners of them." But, if this were conceded, what result or effect would it have in the case? Would it necessarily follow that because an action *at law* could not be sustained in the name of Robinson, the payee, that *such* an action could be sustained on the drafts in the names of the complainants, whose names do not appear upon them at all? Does not this proposition of the counsel, if it proves anything, show that the remedy *must* be in equity to recover upon the drafts, and that that remedy is exclusively in behalf of the complainants? If no action *at law* could be sustained in the name of Robinson, for want of an interest in, or possession of the drafts, *a fortiori* a suit *in equity*, could not be sustained in *his* name for the recovery of the money due on the drafts, and if that be so, it follows that the complainants, alone, can recover on them, and, necessarily, they can only do so in equity. They are the holders—have given the drafts in evidence—and are shown to be the only parties having a real interest in them.

But, perhaps, the counsel wishes to be understood as claiming that *no* action at law, *or* bill in equity, can be sustained by *anybody* on these drafts, that they are not *such* evidences of liability as, upon which, a recovery can be had in any form by anybody.

We have already said, in passing, that the drafts, *per se*, import a valuable consideration, we now say that the record establishes, by the *admissions* of the answer of the Appellant of the truth of the allegations of the bill, that they were given for an executed consideration passing from the complainants, in fulfillment of the written contract of the Appellant, and by his procuration. Hence, there is no question made in the case as to the consideration and ownership of the drafts, and no question is made touching their legal validity, except that they are not payable in money; and another very small point, to the effect that, as said in argument, there is no *allegation* that they were ever delivered to Robinson. If this suggestion is worthy of notice, (and nothing

coming from the learned counsel should be treated as unworthy), we suggest that it is alleged and admitted that the drafts were presented at the proper time and place by somebody for acceptance, and two of them accepted by the Appellant, from which we suppose it is to be legally implied that they had been delivered to somebody whom the Appellant recognized as holder. But they were not payable *in money*—therefore not bills of exchange—technical commercial paper. What, then, were they? The written promises of the defendant to pay a specified sum of money—in what? exchange on New York, the immediate equivalent of money—that which, in the business of the country, serves all the purposes of money. For the breaches of these promises, is there no remedy known to the law? None that may be enforced between the immediate parties? Able and learned counsel seem to think not, such, at least, is the bearing of the argument addressed to this honorable court, and *that* is the apology for these remarks.

Now, what is the real legal effect of these *drafts*, as we call them? We have said they are promissory notes. They are so regarded and defined by lawyers and jurists—as much so as promissory notes in the usual form for *specified amounts of money*, payable in "*current money of Ohio*"—*Lewis* v. *Tipton*, 20, O. St. R. 88; or in "*current Ohio bank notes*"—*Sweetland* v. *Creigh* et al., 15 O. R., 118; or "*in current funds of the State of Ohio*—16 O. R. 5.

Such notes not only import a valuable consideration, but if made with words of negotiability are negotiable—were so holden to be in the cases cited.

An additional word as to the *form* of the drafts, and the agency of William Stewart. By the terms of the contract between the plaintiffs and *Thomson & Groom*, it was agreed that William Stewart, the agent of the plaintiffs, (referred to as the P. C. and C. R. R.) at Pittsburgh, should be authorized to draw on the Appellant at the Bank of the Metropolis, Washington, D. C., at one day's sight for each shipment as forwarded from Pittsburgh—said drafts to be paid promptly, in

exchange, on New York—and the same terms are carried into the instrument, executed at the same time, over his individual signature by the Appellant. (Page 31 of record.) But in the latter instrument the Appellant incorporates the following additional terms: "*I hereby authorize William Stewart, agent P. C. and C. R. R., at Pittsburgh, to draw on me at one day's sight,*" *&c.*

Now, there is no room for question about the meaning of these terms. The Appellant constituted Stewart, (the agent of the plaintiffs at Pittsburgh) *his* agent to draw on him; and thus Stewart became the agent for both of the parties, and his acts done within the scope of the authority given by the Appellant, were obligatory upon him. He was authorized to draw the drafts; did so, signing his own name to them *as agent.* Agent for whom? In that act, assuredly, for the Appellant; but in the concurrent acts of shipping and forwarding the stock, and receiving and disposing of the drafts, he acted as agent of the plaintiffs. The parties chose, each, to employ the same person to be their agent. It was done openly and with full knowledge of all the facts, and the business transacted faithfully and fairly. Although done by the joint agent, yet the acts required to be done by each principal was in contemplation of law the several act of each. The drawing of the drafts was the act of the Appellant by procuration. They were drawn on himself. He was both *drawer* and *drawee*—a thing referred to in the books as "common," though "absurd enough." A draft so drawn for money, was held by all the twelve judges of England to be a bill of exchange; but may be treated as a promissory note at the option of the holder. [See 1 Parsons on Bills and Notes, 61 to 65 and notes, where numerous authorities touching the legal effect of such instruments are cited, and the points ruled abstracted.]

These drafts, therefore, are valid instruments in law, importing a valuable consideration, and admitted to have been made upon such a consideration in fact—and whether technical negotiable bills of exchange or not, might be recovered

upon in an action at law by the payee, if he were the holder, against the Appellant as drawer, if bills, or as maker, if promissory notes—and which the complainants, for whose use and benefit they were made—and who are the holders and owners, in equity, have the right, in equity, to coerce to be paid.

But says the learned counsel (page 8) the bill of complaint is not founded on the *drafts—cannot be*—in its legal effect, but upon the *contract.*

The contract was, that the services of the complainants in transporting the stock of *Thomson & Groom*, should be paid for *by the drafts* of the Appellant. These drafts were given in pursuance, and in fulfillment of the contract—and if the action were at law on the contract, the breach would have to be assigned in a refusal to give the drafts—or, if otherwise, a plea of performance by giving the drafts, would be a bar to the action. The services were to be performed for *Thomson & Groom*, under a special contract to be paid for by the acceptances of the Appellant, and his acceptances (drafts) were given accordingly. The contract of *Thomson & Groom* is not broken, but performed. The sole liability rests on the Appellant, and the evidence of his liability is embodied in the drafts—his promissory notes.

We are thus brought to the defenses set up by the answer and cross-bill of the Appellant, and the other pleadings in the case appearing in the record.

The first thing proper to be noticed on this branch of the case is, that, annexed to the bill are *seven* interrogatories, requiring answers to every material allegation of the bill. (Pages 11 and 12 of record.)

To these interrogatories the Appellant answers, (page 14): "That it is also true that defendant entered into a contract with complainants for the transportation of mules and horses substantially as stated in complainants' bill of complaint. That the defendant answers the interrogatories in the bill of complaint numbered 1, 2, 3, 4, 5, 6, in the affirmative, subject to the reservations and qualifications, after stated. That, as to the 7th interrogatory of said bill, defendant is unable to

answer from any knowledge, information or belief, except as he finds the matter stated in the bill, *and has no knowledge or belief, that it is untruly stated;* but the defendant further says, that it is not true that the contract stated in the bill was fulfilled by the complainants or that the complainants are in equity or justice entitled to have or recover anything from the defendants by reason of the premises; on the contrary, the defendant, while he admits that the complainants did transport some of the animals contracted to be transported as alleged in the bill, yet he says, that complainants neglected and refused to do their duty *as to the other portions of said contract*, and neglected and refused to transport animals to be transported under such contract in such manner as to cause *this defendant* great delay, expense and damage; that complainants transported *other* animals received by them, and to be transported under said contract, *in unsuitable cars*, and in a *negligent manner*, by reason of which the animals got crippled, depreciated, and ruined, to the great damage of *the defendant*. And, further, that complainants delayed and stopped other portions of the animals, undertaken to be transported under said contract, without suitable accommodations, and at inconvenient places, by reason of which many of the animals were greatly depreciated, and *the defendant* greatly damaged, as after stated."

The answer then sets out, in detail, specific acts of negligence and misconduct on the part of the complainants in the transportation of the animals, with a full statement of items of loss and damage alleged to have been sustained by the defendant, amounting in the aggregate to the sum of $24,393.50. The defendant prays that his answer be taken as a cross-bill, and that a decree be entered against the complainants for the amount of the loss and damage so claimed to have been sustained by him, *after deducting the amount of the drafts* sought to be recovered by the complainants; which balance, for which a decree is asked to be rendered in favor of the defendant, is stated in the answer to be the sum of $17,612.30—and is the difference in dollars and cents, between the gross

amount of damages alleged to have been sustained by the defendant as above, and the aggregate amount of the face of the three drafts. It is apparent, therefore, that aside from the set-off, there is no pretense of objection to the *complainants'* claim—and that, reserving the right of set-off, the answers of the Appellant to the interrogatories are intended to be understood as admitting it in manner and form as set up in the bill.

The case made by the cross-bill of the Appellant, to the whole extent of it, is for relief in favor of the Appellant, alone, and is for causes separate and distinct from, and independent of the firm of *Thomson &. Groom;* for which firm, alone, the complainants contracted to transport mules and horses, and to which firm, alone, they would be liable for any breach of their contract in respect to such transportation.

In stating his case for relief in his cross-bill, the Appellant (page 14) says: "That *defendant*, when said contract with complainants was entered into, and afterwards, during the transaction after stated, was engaged in furnishing the government of the United States, under contracts to that end, large numbers of horses and mules for army purposes, which fact was known to the complainants and their agents at that time, and the contracts for transportation were entered into with reference to this state of fact; that the horses and mules purchased by *defendant*, and undertaken to be transported by complainants, were not purchased or transported with a view to sale or market generally, but to supply the government at fixed prices agreed upon," &c. The cross-bill proceeds to state that the Appellant, on certain days named, had, in Cincinnati ready to be transported under said contract, specified numbers of horses and mules, which were taken by the complainants upon cars for transportation, and in reference to which, various acts of negligence, &c., on the part of the complainants are complained of as causing damage and loss to the Appellant, alone, in no way stated to be concerning the firm of *Thomson & Groom*, and for which the cross-bill prays a decree in favor of the Appellant alone.

In the light of its own terms, therefore, the causes complained of by the cross-bill, are not matters of defense against the cause of complaint alleged by the original bill of complaint, but are new and independent matters, and as such can not be brought into litigation and relieved against by cross-bill.

"A cross-bill is a defense; and being so considered is confined to the matters in litigation in the original suit. Without this restriction, new matter might be introduced into a litigation by cross suits, without end;" *Gallatin* v. *Erwin*, *Cunningham* v. *Erwin*, 1 Hopkins Ch. R. 158–9; 8 Con. 361; Story's Eq. Pl., §§ 391–2–3; 1 Daniel's Ch. Prac., 1743, "a cross-bill is a mode of defense," *Field* v. *Scheiffeline*, 7 J. C. R., 252; *Cartright* v. *Clark*, 4 Metcalf, 194. "The original and cross bills are but one cause," and the cross-bill "must be confined to the subject matter of the original bill, and can not introduce new and distinct matters not embraced in the original suit; and if it do so no decree can be founded on those matters," *May* v. *Armstrong*, 3 J. J. Marsh, 262; *Daniel* v. *Morris*, 6 Dana, 186; *Gouverneur* v. *Elmendorf*, 4 J. C. R., 357.

As a matter of set-off, merely, to the extent of the claim of the complainants against the Appellant, it is, for the same reasons, inadmissible to be set up by cross-bill, *Dade* v. *Irwin et al*, 2 How. R., 383.

The causes of complaint attempted to be set up, both as matter of set-off, and for a decree over and above the set-off, are such as, for which, the Appellant has a clear and adequate remedy at law. This is too obvious to require discussion, or reference to authorities in support of it.

In this connection it is proper to notice that the cross-bill is skilfully framed, showing that the draftsman was conscious of "*breakers ahead.*" At the same time that he was conscious of the necessity to make a case calling for relief in behalf of the Appellant *alone*, as he alone was defendant, and not *Thomson & Groom*, he must also so trim his sails as to seem to make his cause of complaint to arise under the

transportation contract, which was between the complainants and *Thomson & Groom*. Hence, he has been careful in the same breath to allege individual damage to the *Appellant*, arising out of negligence, &c., on the part of the complainants in performing their contract with *Thomson & Groom*. Why this? Evidently because the contract liability complained of by the complainants, is against the Appellant alone, whilst that attempted to be set up by the defendant against the complainants, is to the firm of *Thomson & Groom*. But why this persistent, apparent effort, to force this incongruous pretended claim, brought to view in the cross-bill, to be made available in this case? In no possible point of view can the Appellant expect to recover on this cross-bill the alleged excess of $17,612.30 over and above the proposed set-off, even if there were any reasonable ground to hope to make the set-off. Why not, if there is any solid foundation for the claim, proceed for its recovery by an action at law? If available at all, there is a plain and adequate remedy for it in that form; and if as much diligence had been used in that direction, as has been bestowed in what we will be excused for believing to be a vain effort to make it available in this case, the end might have been reached long since. Has there been any secret misgivings about what might be the end, upon the merits, reached in that way, which has made it preferable to take chances in what may result in this effort including the certainty of delay, if nothing else, in being coerced to honor the drafts?

Feeling pressed with the legal difficulty in the way of the Appellant being entitled to a decree in his own behalf, individually, for damages, alleged in a *quasi* way, to have arisen against the complainants for breaches of their contract with *Thomson & Groom*, to transport, for *them*, horses and mules, the learned counsel (page 24, &c.) attempts to rest the Appellant's right to recover on the cross-bill, on the ground, that in the business of transporting the horses and mules, he acted as bailee of *Thomson & Groom*, and he cites and quotes from a large number of authorities to establish the proposi-

tion that bailees are, in law, entitled to recover against wrong-doers, in their own name, full damages for loss or injury to the property under bailment.

We do not feel called upon to controvert this proposition, or to question the soundness of the authorities referred to, but we deny that the Appellant held the relation of bailee, or that if he did, he could, as such, assert such claim, if any, by cross-bill in this case.

The Appellant being himself a member of the firm of *Thomson & Groom*, could not, in legal contemplation, in shipping their mules and horses under the contract, act as *bailee*. He was *partner*, *owner*, and not bailee. It would be something of a novelty for one to become bailee for himself, or for the firm of which he is a member. To so hold would open a new set of principles, leading nobody knows whither; and may as well not be done for the convenience of this party. But if he can be regarded as bailee of *Thomson & Groom*, how is he entitled, as a matter of defense by cross-bill in this case, to assert any claim so arising, in bar of a recovery upon *his individual* promissory notes, or drafts?

We suppose that, in any possible point of view, the foregoing suggestions are amply sufficient to defeat any pretence of claim asserted by the cross-bill of the Appellant, upon the same principle relied upon by his counsel for quite another purpose, viz: that it is apparent from the cross-bill itself, that it makes no case for equitable relief. But the case in this regard, does not necessarily rest upon this. There are both a demurrer and answer to the cross-bill of the Appellant, put in by the complainants; their answer, also, embodying matter as a cross-bill for discovery. Said demurrer (page 28) is so much of the Appellant's cross bill as prays a decree for the *excess* of his claim over and above the amount to be set off against the drafts. On this question all that is needful to be said in argument has been said above. The answer of the complainants to the Appellant's cross-bill (page 24) is to so much thereof as seeks to recoup or set off so much of the claim set up as is equal to the

claim asserted by the complainants. This answer denies that the complainants, by said contract, agreed to transport horses and mules for the Appellant, individually, or that he had the right to, or did individually transport horses and mules under that contract, and if any horses or mules, being the individual property of the Appellant were shipped, it was fraudulently done by him without their knowledge, and that he has no right to recoup or set off, for any injury, if any were done to them, and denies that the complainants were guilty of any negligence, &c.

The complainants also allege that they are ignorant of the names of the individuals composing the firm of *Thomson & Groom*, except that of the Appellant, and the name "*Groom*" —and pray that the Appellant answer and discover the same, and of all other persons interested with *Thomson & Groom* in respect to the horses and mules claimed to have been injured. &c.

[To that cross-bill of the complainants the Appellant demurred, *on terms*, and the counsel was to have filed a demurrer, but omitted to do so—and the case was heard as upon demurrer filed and is, per agreement, to be so disposed of in this court.]

The cause was heard at October term, 1863, of the court below on these demurrers, and a decree entered (page 29), overruling the demurrer of the Appellant to the complainant's cross-bill, and sustaining that of the complainants to so much of the Appellant's cross-bill as it related to; and at October term, 1864, (Jan. 18, 1865), the final decree sought to be reversed, (page 30) was entered.

The final hearing was upon the state of the pleadings as left on the demurrers being disposed of as above, and upon a motion of the complainant for a decree upon the drafts then given in evidence and upon the admissions and issues upon the pleadings.

Every material fact alleged in the cross-bill of the Appellant, necessary to be shown in his behalf to entitle him to relief even upon the footing of his cross-bill, was expressly

put in issue by the answer of the complainants. No evidence whatever was offered by the Appellant in support of his cross-bill. He was content to demur to the matter of the answer as a cross-bill calling on him for a discovery, and *that* being overruled, to submit the case, at the same time withdrawing his motion previously filed for leave to amend his cross-bill.

One thing further remains to be noticed. At page 19, of his argument, the learned counsel makes his XI point, upon what he treats, as an issue upon the allegations of the bill, which he says "ought not to be decided for the railroad companies on the evidence." He then quotes this passage from the bill: "*That all three of said drafts were drawn as above set forth, in consideration of the transportation of mules under said contract, and for no other consideration whatever.*"

Then *this*, from the answer: "*That it is not true that the contract stated in the bill was fulfilled by the complainants, or that the complainants are in equity, and justice entitled to have or recover anything of the defendants by reason of the premises.*"

Having made these quotations, the learned counsel states a legal proposition, and says he supposes it is "unnecessary to do more than call attention to the principle;" and concludes by citing "a few cases bearing upon it," &c.

Not being able to appreciate the point of view in which an *issue* is made upon the passages quoted from the bill and answer, calling for evidence on the part of the complainants, without which, the cause on their part must fail, or which is not fully sustained by the answers of the Appellant to the interrogatories already quoted, we cease further to trouble the court; finding ample reason to ask pardon for so detailed a discussion, rendered necessary from the numerous points presented in the argument of opposing counsel.

H. H. HUNTER,
For Complainants.

Supreme Court of the United States.

No. 183—December Term, 1866.

HARRISON THOMSON, Appellant,

vs.

THE CENTRAL OHIO RAILROAD CO., and
THE STEUBENVILLE & INDIANA RAILROAD CO.

ABSTRACT AND BRIEF

FOR COMPLAINANTS.

A "*civil action*" was instituted by the complainants against the Appellant, in a State Court, in Ohio, to recover the amount of three drafts, drawn by the Appellant by procuration, on himself, payable in exchange on New York, to the order of D. Robinson, Cashier, in payment for the transportation, by the complainants, of mules for *Thomson & Groom*, pursuant to a special contract. Two of the drafts were accepted and protested for non-payment and one for non-acceptance—they were made payable to D. Robinson, Cashier, for convenience of collection, merely, and were *not indorsed* by him.

The code of civil procedure of Ohio (§ 25) requires all suits to be prosecuted in the name of the real parties in interest; and abolishes all distinctions, in *form*, between *actions at law*, and *suits in equity* (§ 3.)

The Appellant caused the case to be removed into the Federal Court pursuant to the Act of Congress—and, on motion of the complainants, leave was given them to file a bill in

chancery in substitution of their original petition in the State Court. The Appellant answered—his answer being also a cross-bill praying relief, on the alleged ground of damage and injury to the mules by negligence of the complainants under the contract of transportation; to be applied, *first*, by way of recoupment or set-off, in liquidation of the claim of the complainants; and, *second*, the balance to be decreed to be paid to the Appellant by the complainants.

The complainants answered, denying the alleged negligence, and all causes of complaint set forth in the cross-bill, and controverting the right of the *Appellant* to recoup or set off damages, if any, sustained to the property of *Thomson & Groom;* and praying, by way of cross-bill, to the cross-bill of the defendant, for discovery of the names, etc., of the individuals composing the firm of *Thomson & Groom.* The complainants, also, demurred to so much of the cross-bill as prayed for a decree in favor of the Appellant for the excess of damages over and above the amount of the complainants' claim; and the Appellant demurred to the cross-bill of the complainants praying for a discovery.

On hearing, in the Circuit Court, the demurrer of the complainants was sustained, and that of the Appellant overruled. No evidence was offered by the Appellant to establish the alleged negligence of the complainants. But the complainants gave in evidence the contract between them and *Thomson & Groom*, and the individual contract, of the Appellant to pay the complainants for the transportation, by his individual acceptances of drafts, to be drawn on him, and the drafts sought to be recovered.

The Court rendered a decree in favor of the complainants for the amount of the drafts, with interest, to reverse which the Appellant prosecutes his appeal; and his counsel assigns, in argument, the following errors, in substance:

1. That leave was given to the complainants to substitute their bill of complaint in place of their original petition filed in the State Court, without any notice to the Appellant of the motion.

Answer—The irregularity, if such it were, was waived by answering over to the bill. *Ferrar* vs. *The United States*, 3

Peters 459; *Parker* vs. *Williams*, 4 Paige 439; *Hume* vs. *Babington*, 1 Hogan 8; 1 Daniels Ch. Pr. 592–3; *Marine Bank* vs. *Fulton Bank*, 2 Wallace R. 258.

2. That the complainants have a plain and adequate remedy, by action at law, for their use in the name of the payee, D. Robinson.

Answer—The suit was necessarily brought in the name of the complainants in the State Court, and had to proceed in their names after being removed into the Federal Court; and their title being equitable, they had a right to proceed in equity.

Story's Eq. P. § 154 (4 Ed.) and notes; *Field* vs. *Maghee*, 5 Paige 539; *Rodgers* vs. *Traders' Ins. Co.*, 6 Paige 583, 589; *The Pres't, &c., of the Bank of the U. S.* vs. *Weiseger*, 2 Peters 331; *Mandeville* vs. *Jemison & Redale*, 1 Cr. 290; 5 do., 322; *Townsend* vs. *Carpenter*, 11 O. R. 21; 3 Leading Cases in Eq. (Hare & Wallace's notes) Am. Ed., *Row* vs. *Dawson*, and *Royal* vs. *Rowles*, and notes, 612 Marg. 280, etc., top; *Ontario Bank* vs. *Mumford*, 2 Bar. Ch. R. 615; *Carter* vs. *U. S. Ins. Co.*, 1 J. C. R. 463; *Farmer* vs. *Bascomb*, 9 B. Monroe, 23; *Moseley* vs. *Bush*, 4 Rand. 392; *Smiley* vs. *Bell*, Mart. & Yerg. 378; *Haynes* vs. *Thomson*, 34 Miss. (5 George) 17.

3. That the Appellant is deprived of his constitutional right to a jury trial, if the proceeding in equity be sustained.

Answer—The case being, upon its facts, rightfully in equity, neither party has a *constitutional* right to a jury trial; but issues of fact may be ordered by the Chancellor to be tried by a jury.

4. That in the Federal Courts, if it appear that a complainant in equity, from the face of the bill, has a clear and adequate remedy at law, the objection to proceed in equity is jurisdictional, and is open to be taken at any time, without demurrer, etc.

Answer—The principle is admitted, but is not applicable to the state of the case. Under the circumstances, there was concurrent jurisdiction in equity, upon the weight of authority; but it became *exclusively* in equity, by reason of the case having originated in the State Court, and being removed from thence

Gaines et al v Relf et al 15 Pet
Livingston v Story 9 Pet 632

into the Federal Court. The case of *Parker* vs. *W. L. C. & W. Co.*, 2 Black, 550, is not in conflict with this proposition.

5. That the drafts in question are not bills of exchange, not being payable in money; and being made payable to D. Robinson, Cashier, for convenience of collection merely, and he not having the possession of them, no action or suit could be sustained in his name on them.

Answer—Admit that to be so, it does not affect the equity of the complainants, as the real owners of the drafts, or their right, as such, to proceed in equity for their recovery; and, *a fortiori*, they may do this, if it be true that no action will lie for their recovery in the name of D. Robinson; for the names of the complainants, although they are the real owners, do not appear on the drafts.

6. That no action or suit at law or in equity can be sustained by any body on the drafts; and the legal effect of the bill of complaint is, that it is founded, *not* on the drafts, but upon the *contract*, on the footing of which they were drawn.

Answer—The drafts, *per se*, import a valuable consideration —are in effect promissory notes, being drawn by the Appellant upon himself—or bills of exchange, at the option of the holder.

[1 Parsons on Bills and Notes, 61 to 65, and notes, defining the legal effect of such drafts.]

As promissory notes, the payee, or the holder in his name, under ordinary circumstances may recover on them, although payable in exchange, etc.

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The *gravamen* of the bill of complainant is exclusively the drafts—the contract is referred to in it merely as inducement and to disclose the equity of the complainants to the drafts.

It will be seen that the contract of *Thomson & Groom* was to pay for the transportation *by the drafts*, and was satisfied when the drafts were given; there is no breach of it, for which an action could be sustained on it.

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To this *very* ingenious device we need only say that the Appellant cannot, by such a fiction, ignore his relations as *owner*, and merge them in *himself* as *bailee*.

In brief outline, the leading features of the case are thus presented, as more fully developed in our printed argument.

H. H. HUNTER,

For Complainant.

Supreme Court of the United States,

December Term, A. D., 1867.

HARRISON THOMPSON, Appellant,

vs.

THE CENTRAL OHIO RAILROAD CO., and
THE STEUBENVILLE & INDIANA RAILROAD CO.

Appeal from the U. S. Circuit Court, for the Southern District of Ohio.

ARGUMENT FOR APPELLANT,

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[NOTE.—There is an error in the printed record. The latter part of the answer and cross-bill of the defendant below is omitted; and in lieu of it, is inserted an "AMENDMENT" (p. 21,) which never was filed. The original record of the case is correct, but a clerical error was made in the copy. I assume that it will be corrected by agreement of counsel, or by a proper motion before the hearing.]

STATEMENT.

A more anomalous and singular record was, perhaps, never seen in this Court.

A special contract for the transportation of mules and horses, from Cincinnati, Ohio, to Harrisburg, Pennsylvania, to be paid for at an agreed price, at Washington, D. C., in Exchange on New York, is the starting point of the controversy. The two Railroad Companies, defendants in error, claim to have performed the contract on their part, and to be entitled to recover the sums named as freight. Thompson, the other party to the

contract, plaintiff in error, claims that the transportation was so delayed, and so negligently performed, that damages were suffered greater than the amount of freight remaining unpaid. This is the question on its merits. The special contract is printed in the record, p. 31, except that the proof reader has made the passage relating to payment of orders, read: "to be paid promptly *on* exchange *in* New York," in lieu of "*in* exchange *on* New York." This error is not however carried into other parts of the record, and need not be further noticed.

It was part of the agreement that William Stewart, agent of one of the Railway Companies at Pittsburgh, should draw on Thompson for freight, under circumstances there stated; not bills of exchange or commercial paper, but drafts or orders to be paid in Washington, "*in exchange on New York.*" In what capacity he was to draw, is ascertainable only by the legal construction of the contract. In point of fact they were drawn over the signature, and directed to be placed to account of "*William Stewart, Ag't,*" without more. If this had been commercial paper, he would, under some of the cases, be held to have drawn them in his individual capacity; but this Court would have allowed oral testimony, perhaps, to show for whom he acted.—*Baldwin* vs. *Bank of Newbury*, 1 *Wallace* 234. Not being commercial paper, all authorities concur in referring to testimony for explanation. There being no testimony, except the contract and the orders themselves, the inquiry is easily disposed of. He was, in fact, the agent of the Railway Company, and is distinctly authorized in that capacity to draw them. The orders themselves direct the proceeds to be placed to account of "William Stewart, Ag't," and it is not supposeable they were in effect to be placed to the drawee's own account. He is nowhere alluded to as agent of anybody other than the company. In legal effect they were drawn by the company.

The drawing of these orders is made, by the special contract, one step in its fulfillment. They are not a change or merger of liability into a new form, but a necessary step in maturing the liability.

On the 20th of April, 1862, the defendants in error filed as plaintiffs, their petition in the Court of Common Pleas, of Muskingum County, O., claiming to recover of the plaintiff in error, the sum of $7,213.20 and interest.—Record, p. 2-3.

Four causes of action going to make up the aggregate claim, are alleged:

1. That Thompson "*being indebted to them for freight*," they drew a draft on him, as stated, for $2,953.60.

2. That Thompson "*being indebted to them for freight upon mules transported from Cincinnati, Ohio, to Harrisburg, Pa.*" they drew a draft on him as stated, for $2,158.40.

3. That Thompson "*was indebted to them for transportation of mules from Cincinnati to Harrisburg, Pa.*" to be paid as stated, and they drew on him, as stated, for $1,669.20.

4. "*That at the request of*" Thompson, "they paid charges *upon a lot of mules of*" THOMPSON, "which were shipped from Cincinnati to Harrisburg, Pa." to amount of $432, which is due with interest.

In the first, second and third causes, is alleged an indebtedness by Thompson for freight, by reason of which they had drawn on him. In the first and second causes, they allege acceptance by him and non-payment. In the third cause, they allege non-acceptance by him, and non-payment. They are spoken of in the petition only as drafts drawn by the Railroad Companies; to all appearance intending to have them understood to be bills of exchange.

The three drafts are all alleged to have been drawn in favor of "D. Robinson, Cashier." No title, legal or equitable, is alleged to be outstanding, and no fact stated from which an outstanding title, legal or equitable, could be inferred.

Each cause of action alleges a general *indebitatus assumpsit*. In three of them, these supposed bills of exchange, had been

drawn for the amounts due, which were not paid. Two of them had been accepted but not paid; one neither accepted nor paid. But as to the fourth cause, no draft had been drawn.

On the petition filed in the State Court, it is respectfully insisted, that it was and must have been a case for a jury trial. No ground appears for Chancery jurisdiction.

After removal to the Federal Court.—Record, p. 6. On motion of defendants in error, "the Court directs the clerk to correct the entry of this case on the appearance docket, so that it be entered as a cause in chancery." Leave was also given to file a bill in chancery—"*in substitution of their petition alleging the same causes of complaint.*"

The record does not show, and I am not aware, that any showing was made to call for that order. Notice to opposing counsel, was not considered necessary. It was treated as a matter of course. If counsel had a right to substitute a bill in chancery for their former action at law, no motion could have been necessary. If they had not such right, no motion, and no order made upon a motion, especially an *exparte* motion, could give that right.

The motion being granted, the bill was filed at once.—Record 6, 7, 8, 9, 10, 11, 12, and a rule taken for an answer.

The bill sets up the special contract, not alluded to in the original petition, alleges performance by defendants in error, and the drawing of three "*drafts or orders*" for the exchange claimed; the amount of which they ask to recover in money. The claim in the original petition asserted as the fourth cause of action is dropped, and nowhere appears in the bill. The three "*drafts or orders*" now set up are for the same amounts as those mentioned in the original petition.

The bill in chancery alleges a shipment amounting to $2,953.60, and a draft for that amount drawn by the said "William Stewart, Agent," as aforesaid, at Pittsburg, by the authority aforesaid of defendant, and by direction of your orators.

That another shipment was made, amounting to $2,158.40, and a draft for that amount, drawn by the said William Stewart,

Agent as aforesaid of the defendant, (Thompson) and in other respects as before.

That a third shipment was made, amounting to $1,669.20, for which amount a third draft was drawn—by whom?—"The said defendant, by the said William Stewart, Agent as aforesaid at Pittsburg, acting by virtue of the authority of defendant, (Thompson,) conferred and given as aforesaid; made his draft or order upon and addressed to the defendant himself."

They were it seems drawn by the same hand and by the same authority. But the petition in the State Court, stated that the drafts were drawn by defendants in error.

The bill in chancery varies the form of statement, with each order. The last one it seems is clearly alleged to have been drawn by Thompson. It clearly is not intended to be alleged that any of them were drawn by the defendants in error, the Railroad Companies jointly. To this extent, they are in law, different from those described in the original petition. In this view, and bearing in mind, that the fourth cause of action in the original petition was dropped entirely, the bill in chancery proceeds upon a cause of action which has no identity with the original cause—*except in the allegation of money due for freight!* In the original petition this was a general *indebitatus assumpsit*, which in the bill in chancery, is converted into a special contract, resulting in a general *indebitatus*.

The bill alleges that these "drafts or orders," were all drawn "to the order of D. Robinson, Cashier." It does not allege that they were delivered to him, or that he ever had possession or knowledge of them, or any of them.

It alleges that Thompson accepted two of them, but did not pay them at maturity: that the third was "duly presented and shown" to him, by reason of which &c., he became "liable to pay"—averring neither acceptance nor refusal to accept. It is not alleged who presented them for payment or acceptance, nor who held them, or either of them, when so presented.

These drafts are alleged in the bill in chancery, to be in the

possession of the defendants in error (plaintiffs below) as equitable owners.

It is alleged that they were made payable to Robinson, Cashier, in trust for their use, "*for the convenience of collection merely*," he "having no beneficial interest therein whatever, being the holder of the naked legal title thereof, merely for the use of your orators as aforesaid."

"Your orators aver that all three of said drafts were drawn, *as above set forth*, in consideration of the transportation of mules, under said contract, and for no other consideration whatever, and in strict conformity with the terms and conditions of said contract; and that your orators being the holders of said drafts, and the equitable owners thereof only; the legal title thereof being in the said D. Robinson, Cashier, are without remedy at law, to coerce payment of the amount due thereon, and can only be equitably relieved in the premises, by the aid of your honorable Court in Equity, &c."

And here is the whole ground alleged for equitable jurisdiction.

What is said of the mere naked legal title, "being in Robinson, Cashier," is a conclusion of law, from the facts before stated, and not a substantive averment of fact.

POINTS OF ARGUMENT.

I . "If damages are sought for a breach of contract, it must be by a suit at law."

The authorities on this point are well collated in *Baker* vs. *Biddle*, 1 Baldwin's Rep., 394 *et seq.*

II. The Ohio Code of Practice does not abolish the distinction made in the Federal Courts between Common Law and Chancery jurisdictions.

III. Actions commenced under that Code in the State Court and removed to the Federal Court will be proceeded in as if commenced in the Federal Court, and will be actions at law or in Equity, according to the nature of the same, determined by the tests which distinguish Common Law from Equity jurisdiction.

Martin vs. *Kanouse*, 1 Blatchford, 149.

IV. If, by reason of the requirements of the State Code, the parties to the action in the State Court were different from the parties required at Common Law, the Federal Court, when the action is removed, may allow new parties to be made, or may recognize the legal right as being where the State law places it. But the difference between the requirements of the Common Law and of the Code, as to parties to an action, can not change the jurisdiction from law to Equity, and take away the right of trial by jury.

Suydam, et al. vs. *Ewing*, 2 Blatchford, 359.
Robinson vs. *Campbell*, 3 Wheaton, 211.
United States vs. *Howland*, 4 Wheaton, 108.
United States vs. *Reid*, 12 H., 362.
Huff et al. vs. *Hutcheson*, 14 H., 586.
Fitch vs. *Creighton*, 24 H., 159.

V. In the Federal Courts, an objection to the jurisdiction or want of equity in a bill has never been overruled for want of a demurrer or plea.

Authorities collated: *Baker* vs. *Biddle*, 1 Baldwin, 416. *Parker* vs. *W. L. C. & W. Co.*, 2 Black, 550.

VI. An action brought by A. against B., setting forth a special contract between them, under which certain orders were to be drawn on behalf of A. (for services therein stipulated) on B., payable one day after sight in exchange on New York, alleging performance of the services, the drawing of the orders, the acceptance of these by B., complaining of non-payment of the orders, alleging A. to have the beneficial interest in, and possession of them, and alleging them to have been drawn in consideration of the services stipulated in the contract, "for no other consideration whatever, and in strict conformity with the terms and conditions of said contract," is an action on the contract.

VII. The writing of the word "accepted" across such orders by the drawee, under such a contract, is, at most, an admission that they were rightfully drawn; which, as between the original parties, may be shown to have been done under misapprehension and mistake, and if so shown, will not estop him from denying his liability on them. *Perkins* vs. *Hart*, 11 Wheaton, 237.

VIII. Such orders are not bills of exchange, because not payable in money.

Authorities collated: 1 Parsons on Notes and Bills, 45, 46, 47, 60, 61.

IX. The fact that such orders were drawn in favor of "*D. Robinson, Cashier*," merely for the purpose of collection, and either never delivered to him, or delivered back to the plaintiff by him, so that at the time action is brought, "*D.*

Robinson, Cashier," has neither possession nor beneficial interest in them, without more, does not show such an outstanding legal title in him as to authorize a suit in equity.

One must either have the beneficial interest in a bill or the posession, to constitute a legal title in him. The fact that his name is on it as drawee or indorsee does not give him legal title.

Dugan vs. *United States*, 3 *Wheat*, 172, 182.
Bank of United States vs. *United States*, 2 *Howard*, 711.
Dollfus vs. *Frosch*, 1 *Denio*, 367.

"If the plaintiff has neither the possession of the paper, nor any right to it by reason of any interest in it, he cannot recover upon it." 2 *Parsons on Bills*, 442, 443 *and authorities cited.*

"A party cannot sue on a bill of exchange in which he has no interest, and of which he has no posession." *Emmet* vs. *Tottenhaur*, 20 *Eng. L. & Eg*, 348.

"It is not as agent, but as *holder or* assignee that the plaintiff must show his right to maintain this suit. In point of fact the note never was transferred to him. If he had the *actual possession* of it, the Court would not entertain an inquiry into his right unless there was some proof that he obtained possession *mala fide*; but the difficulty is that the plaintiff *has not the possession nor a right to the note by reason of any interest he has in it.*' *Olcott* vs. *Rathbone*, 5 *Wend.*, 494.

"Where a note is made for the purpose of raising money on it, and this is advanced by a third person, instead of payee, who never had any interest in it, it is held in some cases that an action cannot be maintained thereon against any of the parties to it in the name of the payee, and with his consent."
2 *Parsons on Notes and Bills*, 444, *and authorities cited.*

"It has also been held that the holder of such paper may declare upon it as payable to himself by the name of the payee." 2 *Parsons on Notes and Bills*, 445; *Hunt* vs. *Al-*

drich, 7 *Foster*, 31; *Elliott* vs. *Abbott*, 12 *N. H.*, 549; *Bank of Newbury* vs. *Rand*, 38 *N. H.*, 166.

If these drafts never were delivered to Robinson, and there is no allegation that they were, why should not the defendants sue on them when regarded in the light of analogy to bills, as payable to them by the name of "*D. Robinson, Cashier?*"

The allegations are that at the time of this suit, Robinson had neither possession nor beneficial interest in them; consequently, he could not have maintained a suit on them.

X. "The mere relation between the parties of trustee and *cestui que* trust, is not enough; there must be that trust which is a creature of a Court of Equity, not recognizable at law."

Baker vs. *Biddle*, 1 Baldwin, 416.

"In all these cases, a Court of law must take notice of the relation of trustee and *cestui que* trust of personal property * * for the distinction between the interest of a trustee and a beneficial interest is founded upon reason, and must exist where any progress has been made in commerce and civilization; *and there is no ground for alleging that a Court of law could not have acted on that distinction in the reign of King Richard I. as in the reign of Queen Victoria.*" Lord Campbell in *Wesboy* vs. *Day*, 75 Eng. Com. Law, 603. This was an action upon a writing obligatory, and the case shows how completely Courts of law take notice of all rights.

The assignee can sue at law in the name of the assignor, and Courts of Equity will never grant relief, where there is an entirely adequate remedy at law. The assignee coming into equity should, then, allege some special circumstances, to show that his remedy at law is inadequate and incomplete.

Dhegetoft vs. *London Ass. Co.*, *Mosely* 83. A demurrer was allowed to a bill brought on a policy of insurance, taken in a trustee's name, on a suggestion that the witnesses live abroad, and that the trustee will not let the plaintiff bring an action in his name. The case was appealed to the House of Lords (8,

Bro. P. C. 525). It was agreed that if bills of this kind were encouraged, it would be, very easy to bring all sorts of property to be tried in a Court of Equity. The decision allowing the demurrer was sustained.

Hammond vs. *Messenger*, 16 *Eng. Ch. Rep.* 328. The Vice-Chancellor decided in this case, that the assignee of a debt cannot sue for it in a Court of Equity, unless the assignor refuses to allow the assignee to sue for it, at law, in his name, or has done or intends to do some act which will prevent the assignee from recovering at law, in the assignor's name.

The Vice-Chancellor; "If this case were stripped of all special circumstances, it would be, simply a bill filed by a plaintiff, who had obtained from certain persons to whom a debt was due, a right to sue in their names for the debt. *It is quite new to me that, in such a simple case as that, this Court allows, in the first instance, a bill to be filed against the debtor, by the person who has become the assignee of the debt.* I admit that, if *special circumstances* are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this Court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law, in his name, this Court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor, is done in collusion with the debtor. If bills of this kind were allowable, it is obvious, that they would be pretty frequent; but I never remember any instance of such a bill being filed unaccompanied by special circumstances."

Rose vs. *Clark*, 20 *Eng. Ch. Rep.* 534. In this case it was decided that an equitable title to money secured by bond, is not of itself sufficient to entitle the party interested, to sue the obligor in equity for the payment of the money.

But it is said in Story's Equity, Sect. 1057 a. "This doctrine is apparently new, at least in the broad extent in which it

is laid down; and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that, wherever an assignee has an equitable right or interest in a debt, or other property, (as the assignee of a debt certainly has) there a Court of Equity is the proper forum to enforce it, and he is not to be driven to any circuity by instituting a suit at law, in the name of the person, who is possessed of the legal title." Ibd. Story's Equity Pleading, Sect. 153, note.

In support of his assertion, Judge Story cites *Riddle* vs. *Mandeville*, 5 *Cranch* 322.
Harris vs. *Johnson*, 3 *Cranch* 311.
Field vs. *Maghee*, 5 *Paige* 539.
Rogers vs. *The Traders Ins. Co.*, 6 *Paige* 583.
Townsend vs. *Carpenter*, 11 *Ohio* 21.

But the cases cited by Judge Story do not prove his assertion; and, so far from the doctrine being new in America, it will be found that the more respectable authorities, whenever the point, has come directly before them, have decided in accordance with the English rule.

The first case cited by Judge Story, is: *Riddle* vs. *Mandeville*, 5 *Cranch* 322. It was an action by an endorsee against his remote endorser. The action was originally brought *at law* (1 Cranch) and *dismissed* on the ground that the act of the Virginia Assembly, which makes notes assignable, did not give the endorsee of a promissory note an action at law, against a remote endorser. The suit was then brought in equity and sustained. In this case there were special circumstances to induce a Court of Equity to grant relief, i.e. the fact that there was no remedy at law. This is evident from the language of the Chief Justice. "It is then, the opinion of the Court, that, without referring to the depositions to which exceptions have been taken, a right exists in the holder of a promissory note, *at least where he cannot obtain payment at law*, to sue a remote endorser in equity."

The next case cited, *Harris* vs. *Johnson*, 3 *Cranch* 311 is similar to the last. It decided the same point, viz.: that an endorsee of a promissory note, payable to order, cannot in Virginia, maintain an action at law, upon the note against a remote endorser, but he may in equity. These cases then only decide that when a remedy is not given at law, the assignee of a chose in action may come into equity. When, therefore, they are cited by Judge Story, to prove that the assignee is not to be driven to any circuity by instituting a suit at law, in the name of the person possessed of the legal title, it seems to be overlooked that the fact, that the party had instituted his suit at law, and been defeated, was the circumstance that led the Court of Equity to grant relief.

The cases next cited, are: *Field* vs. *Maghee*, 5 *Paige* 539, *and Rogers* vs. *The Traders Ins. Co.*, 6 *Paige* 583, in both of which it was decided that in a Court of Chancery the assignee of a chose in action, is not permitted to sue in the name of the assignor, but the suit must be brought in the name of the real party in interest. I do not understand these cases to decide the point in question.

The same Chancellor, Walworth, who decided these cases, laid it down as the rule in the case of *The Ontario Bank* vs. *Mumford*, 2 *Bar. Ch. R.* 615, that generally a Court of Chancery will not entertain a suit brought by the assignee of a debt, or of a chose in action, which is a mere legal demand; but will leave him to his remedy at law, by a suit in the name of the assignor. Where, however, *special circumstances* render it necessary for the assignee to come into a Court of Equity for relief, to prevent a failure of Justice, he will be allowed to bring a suit here upon a legal demand.

When, therefore, he decided that an assignee must sue in a Court of Equity in his own name, it must be understood with the qualification just mentioned, viz.: that there are special circumstances which permit him to come into equity.

The last case cited by Judge Story, is *Townsend* vs. *Carpenter* 11, *Ohio* 21. In this action the holder of the legal title was

made a party defendant, and *special circumstances alleged.* The object of the bill appears to have been to prevent the maker of the note from using a claim against the holder of the legal title as a set-off.

The next section of Story's Equity, Sec. 1057, *b*, states the exceptions to the rule in Sec. 1057, *a*, broadly enough to include the present case.

But the weight of authority, English and American, and the weight of reason are clearly with us.

Carter vs. *United Ins. Co.*, 1 *Johns Ch.* 463. A bill filed to recover the amount of a total loss on a policy of insurance, stating *no other* ground of equitable relief, than that the policy had been assigned to the plaintiffs by the insurers, in whose name it had been effected, and that the assured refused to pay, was, on demurrer, dismissed, with costs, *the plaintiff having an adequate remedy at law.*

The Chancellor, "The demand is properly cognizable at law, and there is no good reason for coming into this Court, to recover on the contract of insurance. The Plaintiffs are entitled to make use of the name of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the Chancellor, in the analogous case of *Dhegetoft* vs. *The London Assurance Co.* (Mosely 83) that, at this rate, all policies of insurance would be tried in this Court, in that case the policy stood in the name of a nominal trustee, but that was not deemed sufficient to change the jurisdiction, and the decree was afterwards affirmed in Parliament, (3 Bro. P. C. 525,) the bill in this case, states no *special ground* for equitable relief, nor is any discovery sought which requires an answer."

Mosely vs. *Boush*, 4 *Rand*, (*Virginia*) 392. The assignee of a chose in action has not a right, *in all cases*, to come into a Court of Equity, upon the mere ground that he cannot sue in his own name, at law; but it must appear that he is prevented from sueing at law in the name of the assignor, or that the as-

signor himself would have had a right, if he had not assigned to go into a Court of Equity.

Per Green, J. "It is said that Boush, or Boush and his daughter were debtors to Burroughs, who had assigned this debt to the plaintiff; and that a Court of Equity had jurisdiction to entertain the suit of an assignee of a chose in action against the debter, in all cases, upon the mere ground that the plaintiff cannot sue in his own name, at law. I cannot for myself accede to this proposition. If it were so, a very large portion of the proper business of the Courts of Law, might be transferred to the Courts of Equity, and the debtor deprived of his right to his trial at law, and by a jury, without his consent or default. To give such a jurisdiction it ought to appear that the plaintiff is prevented from recovering at law, in the name of the assignor, by collusion between the debtor and assignee; or that from the nature of the claim, or the circumstances of the case, the assignor himself would have had a right if he had not assigned to claim the aid of a Court of Equity."

Farmer vs. *Bascom*, 9, *B. Mon.* 23. Per Simpson J. "The demand upon which the suit was instituted in this case, was an unliquidated physician's account. It had been assigned to the complainant, not being assignable at law, and the complainant not having acquired the legal title by the assignment, but only an equitable interest in it, it may be contended, that he had on this ground, a right to come into a Court of Chancery. The nature of the demand against the debtor, was not changed by the assignment. The assignee had a right to sue in a Court of law, in the name of the assignor. A resort, therefore, to a Court of Chancery, was not necessary to enable him to collect the debt. If the mere assignment of a chose in action, had the effect of transferring the jurisdiction from a Court of law to a Court of Chancery, it would produce a considerable change in the jurisdiction of the two Courts. The appropriate remedy is in a Court of law. The assignment itself produces no necessity for a change of jurisdiction. The assignor being a trustee in equity for the assignee, a breach of trust on his part, might

authorize an application by the assignee, to the Chancellor for relief. But unless misconduct on the part of the assignor is charged, or some other matter sufficient to impart jurisdiction, a Court of Equity has not jurisdiction of a legal demand, in a suit by the assignee, merely upon the ground that by the assignment, he had not obtained the legal title, but only an equitable interest in it."

The Ontario Bank vs. *Mumford*, 2 *Bar. Ch. R.* 615. Walworth Chancellor, "It remains to be considered whether there is anything stated in the complainants bill, which is sufficient to authorize the Court of Chancery to take jurisdiction of this case instead of leaving the bank, as the assignee of the bond, to seek its remedy by an action at law against the obligors in such bond. As a general rule this Court will not entertain a suit brought by the assignee of a debt, or of a chose in action, which is a mere legal demand; but will leave him to his remedy at law, by a suit in the name of the assignor. Where, however, *special circumstances* render it necessary for the assignee to come into a Court of Equity for relief, to prevent a failure of justice, he will be allowed to bring a suit here upon a legal demand."

This case was decided by the same Chancellor that decided *Field* vs. *Maghee*, 5 *Paige* 539, and *Rogers* vs. *The Traders Ins. Co.*, 6 *Paige* 584. When, therefore, he determined in those cases that the assignee sueing in equity, must bring the suit in his own name, it must be understood with the qualification given in this case i.e. that special circumstances render it necessary for him to come into a Court of Equity.

Smiley vs. *Bell*, *Mart & Yerg.* 378.—A for a valuable consideration, assigned to B, an open account due to him from C, upon which suit was instituted against C in A's name, for the use of B: pending the suit, A died intestate, and no person having administered upon his estate, it abated. B then filed this bill, alleging the above facts, and further stated that no person would administer upon C's estate, in consequence of its em-

barrassed and insolvent condition—held that a Court of Equity has not jurisdiction in such a case.

Adair vs. *Winchester, et al, 7 Gill and Johnston* 114. M & P, partners in trade, delivered to R, as their agent, four promissory notes to be discounted for their use. Failing to get them discounted, R, with the approbation of M & P, placed them by way of pledge, with A, to secure the re-payment of a sum which A agreed to, and did loan upon them. M & P becoming insolvent executed a deed of trust of their estate to W; and A notified of the transfer to W, who tendered him the principal and interest of his advance, refused to deliver up the notes, which have since been paid. Upon a bill filed praying for an account and payment of the balance to W, held that chancery had no jurisdiction of this claim, the bill presenting nothing more than an action for money had and received.

Equity does not lend its aid to enforce the rights of the assignee of a chose in action, unless its interposition becomes necessary, by reason of the inability of a Court of common law to do him adequate justice.

The assignee of a chose in action must pursue his remedies in the same tribunal, in which the assignor, had no assignment been made, was bound to seek them. Where obstacles growing out of the assignment are so interposed, as to hinder, or render extremely difficult the successful prosecution of his remedies at law, then will a Court of Equity extend to him, that equitable protection which his exigencies demand.

Over *quasi* trusts, Courts of law have jurisdiction, and are competent to administer adequate and complete justice; under ordinary circumstances chancery has no concurrent jurisdiction of them.

Dorsey J.—The first question for our consideration is, had the Chancery Court jurisdiction over such a case, as is presented by the bill of complaint? View the case as you will, and it is, in its effect, nothing more than an action for money had and received. That by proceeding in a Court of law, ample and perfect redress for the wrong complained of, could have been ob-

tained, has not been and cannot be denied. How then can the appellee sustain the right of the Chancellor to adjudicate in such a case, consistently with the well settled general principle found in all the books on the subject, and announced as text-law in Mitf. Pl. 123, that the Courts of Equity will not assume jurisdiction, where the powers of the ordinary Courts are sufficient for the purposes of Justice? Is there anything in the facts of this case, either as charged in the bill, or disclosed in the proof, which removes it from the operation of the general rule? The mere fact of the complainants standing in the character of an assignee, will not sustain the jurisdiction. Although in a Court of Chancery, the assignor is looked upon as the trustee of the assignee, the *cestui qui trust*, equity does not lend its aid to enforce the rights of the assignee of a chose in action, unless its interposition becomes necessary, by reason of the inability of a Court of common law to do him adequate justice: notwithstanding in the language of 1 Mad. Ch. Pr. 545, the assignment "is considered in the nature of a declaration of trust," and on 546, that Courts of Equity "will protect the assignment of a chose in action, as much as the Courts of law will that of a chose in possession." The same author on page 547 states, "that an assignee of a chose in action, as he is entitled to all the remedies ofthe seller, so he takes it subject to the same equity as it was liable to in the assignor's hands." He must pursue his remedies in the same tribunals, in which the assignor, had no assignment been made, was bound to seek them. When obstacles growing out of the assignment are so interposed, as to hinder, or render extremely difficult, the successful prosecution of his remedies at law, then will a Court of Equity, upon the appropriate application, step forward and extend to him that equitable protection which his exigencies demand. But this protective interposition is never afforded until rendered necessary by the occasion.

Haynes vs. *Thompson*, 34 *Miss.* (5 *George*)17. A Court of Equity will not entertain a bill by the equitable assignee of a bond, to recover the amount due thereon; the remedy of com-

plainant being complete at law by an action in the name of the obligor for his use.

Fisher, Justice.—This is an appeal from a decree of the Chancery Court of Clarke County.

The facts are briefly these: Haynes sold to Hodges a tract of land at the price of $400, and executed his bond, reciting the payment of $200, and covenanting to make to Hodges a title upon the payment of the balance of the purchase money. Hodges assigned this bond to Thompson, the complainant, who, tendering the balance of the money to Haynes, demanded a title, and Haynes refusing to make a title, on account of his inability so to do, the complainant filed this bill to recover the amount paid by Hodges to Haynes. The question raised by the demurrer is, whether the complainant has a complete remedy at law. It is true that the bond is not such an instrument as is assignable under the terms of the statute. Yet the complainant's right to sue in the name of Hodges, for the use of the former, is as complete as if the legal title had passed under the term of the assignment of the bond. Under this view, we are of opinion that the Court below erred in overruling the demurrer to the bill. Decree reversed, demurrer sustained, and bill dismissed.

XI. Without reference to that part of Thompson's answer which is in the nature of a cross-bill, its allegations deny the case set up in the bill, and make an issue which ought not to be decided for the railroad companies on the evidence.

The bill states, "*That all three of said drafts were drawn as above set forth, in consideration of the transportation of mules under said contract, and for no other consideration whatever.*"

The answer, page 2d, states: "*That it is not true that the contract stated in the bill was fulfilled by the complainants, or that the complainants are in equity and justice entitled to have or recover anything of the defendants by reason of the premises.*" It then proceeds to particulars, not necessary here to be repeated, and claims a balance of damages.

If the special contract were relied upon, its performance must be proved. On failure of strict performance, the plaintiff necessarily had to rely on an implied promise to pay what he deserved. If he deserved nothing he got nothing.

I suppose it unnecessary to do more than call attention to this principle; but in citing a few cases bearing upon it, I invite especial attention to the fact that it applies as well where notes and bills have been given as where they have not.

Withers vs. *Green*, 9 *How*, 213, is a case where a bond had been given, which a local statute placed on the same footing with notes and bills. This case covers a discussion not merely of the local law, but of the common law.

The Court says, p. 227, near bottom: "By the earlier English decisions, the following principles appear to have been inflexibly ruled, viz: That whenever a contract was tainted by fraud, it never could, if this were shown, be made the foundation of recovery to any extent, but must be set aside *in toto*.

"That in all instances wherein a party was injured either by a partial failure of consideration for the contract, or by the nonfulfillment of the contract, or of a warranty, the *person injured* could not defend himself in an action on the contract, by proving these facts, but could find redress only in a cross-action against the plaintiff. *These rules of the common law Courts appear to have yielded materially to the influence of common sense and common convenience.* An example of this may be perceived in the permission given in cases where a recovery is sought upon the principle of *quantun meruit*, to set up as a defense that the plaintiff has unfairly, or injuriously, or imperfectly fulfilled his obligations towards the defendant, and that he should, in such cases, recover only so far as he could prove a meritorious performance; admitting, in these instances at least, the defense founded on *discount*, or on partial failure of consideration, or a dishonest performance."

Again, on p. 230, near top: "But however the rule laid down by the Courts of England should he understood, *it has* repeatedly been decided by learned and able judges in our own

country, when acting, too, not in virtue of a statutory license or provision, but upon principles of justice and convenience, and with a view of preventing litigation and expense, and where fraud has occurred in obtaining or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied upon in defense by a party when sued upon such contracts, *and that he shall not be driven to assert them either for a protection or as a ground for compensation in a cross-action.*"

In *Van Buren* vs. *Digges*, 11 *How*, 461. The same question is discussed and decided the same way, p. 475. "This doctrine of the earlier cases has been essentially modified by later decisions, and brought by them to the test of justice and convenience, which requires that whenever compensation or an equivalent is claimed by a party in return for the performance of conditions for which such compensation or equivalent has been stipulated, the person so claiming is bound to show fulfillment in good faith of those conditions; *and the party against whom the claim shall be made shall be permitted to repel it by proof of an entire failure to perform, or of an imperfect or unfaithful performance, or by proof of injurious consequences resulting from either of these delinquencies*, AND SHALL NOT BE DRIVEN EXCLUSIVELY TO HIS CROSS ACTION."

Such, then, is the settled doctrine of this Court. The application of it to a great variety of circumstances is shown in *Sedgwick on Damages*, pp. 448–474.

It was specifically applied to claims for freight by common carriers as against claims for damages to the things carried in

Boggs vs. *Martin*, 13 *B. Monr.*, 239.

In *Saye* vs. *Gittner*, 11 *Barbour*, (*N. Y.*) 120, and

In *Bowman* vs. *Hilton*, 11 *Ohio Rep.*, 303.

That it applies as well where notes or bills have been given,

4 *O. St. Rep.*, 680.

22 *Pick*, 510.

23 " 224.

9 *Metc.*, 278[1]
7 *O. St. R.*, 97.
8 *Wend.* 109–107.

As between original parties, the consideration of a bill is always subject to inquiry. 1 *Parsons on Bills*, 175.

Thus far I have spoken only of common law principles which are adopted in this Court. The contract, however, is an Ohio contract, and the liability of the parties, as fixed by the Ohio law, is the only liability this Court can recognize.

The Ohio statute, 2 *Swan & Critchfield*, 981, *Sec.* 99, provides:

"When cross-demands have existed between persons under such circumstances, that if one had brought an action against the other, a counter claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, *but the two demands must be deemed compensated, so far as they equal each other.*" By another section, (95, p. 979) a party omitting to insist on his counter claim cannot afterwards recover costs.

To whatever extent, therefore, these damages were a valid counter-claim, they "*compensated*" the bills, and plaintiff's claim was extinguished. It was to that extent and without reference to pleadings, practice or forum, an extinguished or compensated claim, not maintainable *anywhere*. The facts *wherever* shown, were facts showing no valid claim. In *Withers* vs. *Green*, 9 *H.* 221, before cited, the Court said, p. 221, near top: "The contract in question having been made within the State of Alabama, and designed to be performed within that State, the *lex loci contractus* must justly be understood as entering into and controlling the effect of its stipulations, and having been sued upon within the same State, the *lex fori must, in a great degree, regulate the mode of its enforcement.*"

I understand this to mean that the law of the State will be taken as the test of the character and extent of liability; but the United States Courts will enforce and work out, by their own methods of practice, the rights ascertained to exist under

the State laws. On this principle it is, I suppose, that this Court, both in law and equity, enforces the State laws of set-off and limitation, and all other statutes which affect legal rights in the subject matter of the litigation.

This Court has long recognized the local remedies given by statute as in the case of creditor's bills.

In *Strahan, et al.* vs. *Clyburn and wife*, 3 *McLean's R.*, 174, Judge McLean said:

"This Court, under various acts of Congress, *and by virtue of its own rules*, adopts the remedies authorized in the State Courts, *though they may be local and peculiar in each State.*"

Again:

"But where a *new mode of procedure* is authorized by a State which is appropriate to Chancery powers, *relief will be given in the mode provided by the United States Courts.*"

Lammon vs. *Clark*, 4 *McLean*, 18.

Suydam vs. *Beal, et al*, 4. *McLean*, 12.

These authorities might be cited to support a stronger proposition than I now make. My point now is merely the proposition made some pages back, that as between the carrier and his employer the carrier cannot recover his hire and turn his employer over to his cross-action for damages. But the damages may be shown in the same action as a defense to the full extent of the claim.

This is now the doctrine of this Court, with or without any local statute. The statute of Ohio, as applied to this case, covers the same ground. There is no liability except with that limitation, either in law or equity. I am not now inquiring for the right to recover damages beyond the amount of hire, but only for the common law right as established in the cases cited, to the extent of hire.

My proposition is, that if damages were suffered to the extent of the hire, the plaintiff is not entitled to recover.

XII. The answer of plaintiffs to the answer and cross bill of

defendants is, in substance, insufficient. By overruling the demurrer to it, and holding it to be sufficient, all defendant's evidence was rendered unavailing and excluded.

It presents a denial that the stock transported was the individual property of Thompson, and asserts that if it was, he had no claim for damages *because it was his.* It then presents the alternative, that "if it was the property of Thompson & Groom or other persons interested with them," Thompson can assert no claim *because it was not his.* Whether his or not, it therefore denied his right, both because it *was*, and because it was *not.* In either event, it was useless to offer his evidence.

1. The pleading, instead of being a reply to defendant's answer and cross petition, was an argumentative demurrer. Taken with the other demurrer, it constituted, in effect, a demurrer to the whole answer and cross petition. Its result was the same as the result of a general demurrer. It excluded the whole defense, and left the plaintiff to prove his case as if no defense had been asserted.

2. The defense attempted in that pleading is not open to defendants in error.

The original bill makes the contract sued on a contract with Thompson, for himself and other parties, but not a contract with other parties. It charges Thompson, alone, with making the shipments "in pursuance of the contract."

The answer and cross petition by Thompson, treats it in the same way. It is the claim asserted in the bill, and admitted in the answer.

It was, at worst, a bailment to Thompson, which entitles him to assert whatever claim there may be against the carrier.

Suppose the defendant had personally contracted for all the stock to be shipped from Kentucky; would not he be the person to deal with? So the plaintiffs contracted for services to be performed by other roads, yet the plaintiffs and Thompson were the contracting parties.

Thompson alone was to accept and pay orders for the freight.

What his special relation might be to the owners, the bill does not state, nor does the answer. The law must say what his relations were *on the facts as pleaded.*

These facts are, that *he and he only*, caused the shipments to be made; he and he only assumed to pay by accepting and paying orders. I must ask the Court to notice that it is not a case of shipment by several parties, to be paid for by one, which is made here. If the allegations had been of that character, the evidence (none of which has been offered,) might or might not sustain the allegations, but such are not the allegations, nor is there any evidence offered. We have nothing to do here with that sort of case.

I repeat it is a case where the defendant alone caused to be delivered for transportation property belonging to several persons, and assumed to accept and pay orders for the transportation on the terms agreed.

What, then, was defendant's relation to that property? The law answers: "*He was a bailee.*"

"The term Bailment is derived from the French word *bailler*, which signifies to deliver. It is a compendious expression, to signify a contract resulting from delivery." *Story on Bailment*, 7th Ed., p. 1, Sec. 2.

"A delivery of goods on a condition expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered." *Jones on Bailment*, 90. *Story, Sec.* 2.

Ld. Holt. "Either a delivery to one that exercises a public employment, or a delivery to a private person." *Coggs* vs. *Bernard*, 2 *Ld. Raymond*, 917, 918.

"Whether the delivery be for a reward, or without a reward, for custody or for feasance, makes no difference as to the case being a bailment." *Story on Bailment*, 2, *note* 2, *near bot. of page.*

"Receiving goods from another upon an agreement to sell and account for such goods to the owner, or to return the same as good as when taken, with interest, amounts to a *bailment*

and not to a sale. *Morse* vs. *Stone*, 5 *Barb S. C.* (*N. Y.*) 516.

"And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, *if the bailee once enter upon the trust and take the goods into his possession. Story on Bailment, note to p.* 6 *and authorities quoted.*

" Delivery of a chattel from one person to another for a special object or purpose. *Id. Ib.*

There is no allegation concerning how the different owners were "*interested with*" or "*associated with*" each other. The assumption that their interest was joint or ownership joint is mere assumption. It may be so or otherwise. Numerous persons may have been purchasing *for* Thompson for a commission on the amount purchased, or on the amount of sales, or on the amount of profit.

The material fact is, that Thompson alone caused them to be delivered for shipment; *for that purpose and to that extent* he had posession, and in connection with that office performed by him, he incurred individual liability. *It was a bailment to him*, so far as others may have had an ownership, in case they had any.

" It is a general rule that either the bailor or the bailee may in such a case (mandate) maintain a suit for redress; and a recovery of damages by either of them will be a full satisfaction, and may be pleaded in bar of any subsequent suit by the other." *Story on Bailments*, *Sec* 94, 150, 152, 280, 352. Agistors of cattle may maintain trespass or trover. *Id. Sec.* 443. Warehousemen, *agents*, factors, commission merchants, bailiffs, *Id. Ib. Sec.* 422, 422 *a.*

" An action for an injury to personalty may also be brought in the name of the person having only a special property or interest of a limited or temporary nature therein." 1 *Chit. pl.* 70.

"Actions against carriers may be brought in the name of bailees *or agents*, who have the rightful custody of the goods, *and who make the bailment*, or in the name of the owner," and a recovery "in the name of any one having either a general or

special property in the goods," will bar a subsequent suit. *Redfield on Railways*, 322, *Sec.* 8–9.

Can the bailee of goods, who delivers them to a common carrier for transportation sue in his own name for damage done to the goods?

"In case of a bailment, it is clear that the bailee has such a continuing interest in the goods, until their arrival at the place of destination, as to entitle him to sue the carrier, in case they are lost or damaged on their passage." *Angell on Common Carriers, Sec.* 492.

"Actions against carriers may be brought in the name of bailees or agents, who have the rightful custody of the goods, and who make the bailment, or in the name of the owner." *Redfield on Railways, page* 322.

Freeman vs. *Birch*, 28 Eng. Com. Law Rep. 326, held, "The bailee of goods, sending them by a carrier to the bailor, may sue the carrier for negligence."

The plaintiff, a laundress, residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which traversed from Chiswick to London. A basket of linen belonging to one Spinks, was sent by the defendant's cart, and on its way to London part of the contents were either lost or stolen. Spinks did not pay the carriage of the linen. It was objected on the part of the defendant that the action should have been brought by the owner of the linen. The objection was overruled, and a verdict found for the plaintiff. A new trial was moved for, on the ground of misdirection. *Littledale J.*

In the cases cited, the property in the goods was entirely gone out of the vendor. ***In this case, the laundress retained a special property in the goods.***

"Upon the decision in the case of *Freeman* vs. *Birch*, it has been remarked: "Though it clearly establishes the right of the bailee to sue, yet this must not be understood necessarily to exclude the bailor from the exercise of a similar right; supposing, that is to say, he chooses to step in and anticipate the

bailee in bringing an action—a conclusion which seems to be deducible from the general state and condition of property under bailment, which is, as it were, *in dubio* between the parties, and vested for some purposes in the bailee, and for some in the bailor. The right of property being thus floating and undetermined, it seems to follow that the right of action which arises from it, must partake of the same properties and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself." *Angell on Carriers, Sec.* 493. *Nicolls* vs. *Bastard*, 2 *Cro. Mes. and Ros.* 660.

Parke, B. "I think you will find the rule is, that either the bailor or bailee may sue, and whichever first obtains damages, it is a full satisfaction."

Elkins vs. *The Boston & Maine Railroad Co.*, 19 *N. H. Rep.* 339. A third person rolled up the plaintiff's coat, in a bundle with his own coat, and placed his own name and address upon the bundle, and delivered it to the defendants, who were common carriers, for transportation. Held,

That the plaintiff might maintain an action against the defendants to recover damages for the loss of his coat.

That where the bailee of property delivers it to a carrier for transportation, either the bailee or bailor may maintain an action against the carrier for the loss of the property.

"*Per Curiam*: "The property in articles bailed is for some purposes in the bailee and for some in the bailor. The right of action must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself. The decision in *Freeman* vs. *Birch*, although it clearly establishes the right of a bailee to sue, does not necessarily exclude the bailor from bringing an action, if he chooses to anticipate the bailee in so doing. The rule in such cases is stated by Baron Parke to be that either the bailor or bailee may sue, and whichever first obtains damages, it is a full satisfaction."

Can the bailee maintain an action for the full amount of the damage done, or only to the extent of his special property?

The action by the bailee is a bar to an action by the bailor for the same injury.

"It is a general rule that either the bailor or bailee may maintain a suit for redress, and a recovery of damages by either of them will be a full satisfaction, and may be pleaded in bar of any subsequent suit by the other." *Story on Bailments, Sec.* 94, *ib. Sec.* 352.

"As every bailee is in the lawful possession of the subject of the bailment, and may justly be considered, notwithstanding all the nice criticisms to the contrary, as having a special or qualified property in it for the protection of that possession, and as he is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the thing; and he that begins the action has the preference, and a judgment obtained by one of them is a good bar to the action of the other."

Kent, Vol. 2, *page* 585.

Faulkner vs. *Brown*, 13 *Wendell*, 63.

Faulkner had in his posession a quantity of leather belonging to one Van Slyck, who had left the same with him, and requested him to take care of it. It was stolen from the possession of Faulkner, and sold by the thief to Brown. Faulkner demanded the leather of Brown, and on his refusal to deliver it up, brought an action of trover against him in a justice's Court. The justice being of opinion that Faulkner was not entitled to maintain an action for the leather in his own name, rendered judgment against him for costs. The Common Pleas of Schenectady affirmed the judgment, on *certiorari*, and the plaintiff sued out a writ of error.

By the Court, Savage, Ch. J.: "Both Courts were clearly wrong. To maintain trover, the plaintiff must have the general or special property. The plaintiff here had a special property in the leather. Van Slyck had the general property. The action may, in most cases, be brought either by the general or special owner of the goods for a conversion by a stranger,

and judgment obtained by one is a good bar to the action of the other."

Smith vs. *James*, 7 *Cowen*, 328. Held, that trover lies at the suit either of the general or special owner of goods, and that a recovery by one will bar the other.

If, then, a recovery by the bailee will bar an action by the bailor, the two actions must be commensurate, and as the bailor can recover for the full damage, so can the bailee.

White vs. *Webb*, 15 *Con.* 302.

Per curiam: "In actions of trover and trespass, for property taken and converted by the defendant, where there is no malicious motive on the part of the defendant, but he takes the property under a claim of right, and the real dispute is as to the title. The rule of damages is the value of the property at the time of the conversion or taking, and interest on that sum to the time of judgment. If, however, the suit is brought by a *bailee* or special property man, *against the general owner*, then the plaintiff can recover the value of his special property only; but if the writ is *against a stranger*, then he recovers the *value of the property and interest*, according to the general rule, and holds the balance, beyond his own interest, in trust for the general owner"

Ingersoll vs. *Van Bokkelin*, 7 *Cowen*, 670, *note* (*a*).

"Another distinction should likewise be observed between trover to enforce a lien against the general owner, or one converting the goods by his direction, and the like action against a stranger. In the latter case, the creditor may recover the full value, though exceeding his lien, and then stand a trustee for the general owner as to the balance; but when the action is against the general owner, or one acting under him, the creditor can recover only according to his special interest. This just distinction was raised, commented and acted upon in *Lyle* vs. *Barker*, (5 *Bin.* 457–60) where it is shown to be very ancient."

If I am right in either of the above arguments, the plaintiffs cannot recover a judgment on the present pleadings and evidence.

If I am right in the argument last advanced, all objections to the answer *as to parties and ownership* are invalid.

These arguments apply with equal force in equity as at law.

RESULT:

I. No case for Chancery jurisdiction and bill should be dismissed.

II. If jurisdiction for bill, jurisdiction for answer follows; and the answer shows a full defense.

III. The answer and cross-bill to the answer and cross-bill of defendant's below, was irregular and insufficient, and should not be allowed.

IV. The whole record shows that the merits of the questions between the parties have not been reached, and under the rulings below could not be reached. Thompson could not even put his evidence in so as to make it part of the record.